No. ———

In The

Supreme Court of The United States

October Term, 1957

THE SUCHER PACKING CO.
Petitioner

vs

MANUFACTURERS CASUALTY
INSURANCE COMPANY
Respondent

COPY OF APPENDICES IN UNITED STATES COURT OF APPEALS

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No. 12815

United States Court of Appeals

FOR THE SIXTH CIRCUIT

THE SUCHER PACKING CO.,

Appellant,

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,

Appellee.

APPENDIX TO APPELLANT'S BRIEF

On Appeal from the District Court of the United States, from The Southern District of Ohio, Western Division, at Dayton

JEROME GOLDMAN
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APPENDIX

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In the
UNITED STATES DISTRICT COURT
Southern District of Ohio, Western Division.

Civil 1622
at Dayton, Ohio

THE SUCHER PACKING CO.,
Plaintiff.

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,
Defendant.

STATEMENT OF RELEVANT DOCKET ENTRIES

* * *

11-29-54 Second amended complaint filed.

11-29-54 Trial commenced—jury impaneled and sworn, plaintiffs testimony not concluded.

11-30-54 Trial continued, plaintiffs testimony continued but not concluded.

12- 1-54 Trial continued, plaintiffs testimony continued but not concluded.

12- 3-54 Trial continued, plaintiffs testimony continued but not concluded.

12- 6-54 Trial continued, plaintiffs testimony continued but not concluded.

12- 7-54 Trial continued, plaintiffs testimony continued but not concluded.

12- 8-54 Trial continued, plaintiff's testimony continued but not concluded.

12- 9-54 Trial continued, plaintiffs testimony concluded, plaintiff rests.

Statement of Relevant Docket Entries

12-13-54	Answer of defendant filed.
12-13-54	Trial continued, not concluded.
12-14-54	Trial continued, defendants testimony concluded and defendant moves for dismissal or directed verdict, overruled.
12-15-54	Trial continued, final arguments to jury continued to 12-16.
12-16-54	Charge to jury, jury retires.
12-16-54	Special verdict filed.
12-27-54	Judgment on special verdict filed — Plaintiff to recover $83.00 with interest at 6% from Jan. 3, 1951 and costs — copies mailed to attorneys.
1- 5-55	Motion of plaintiff to set aside verdict and judgment and for new trial filed.
12-12-55	Order overruling motion for new trial filed.
1- 9-56	Notice of appeal filed.

SECOND AMENDED COMPLAINT

Now comes the plaintiff and says that the plaintiff, The Sucher Packing Co., and defendant, Manufacturers Casualty Insurance Company, are corporations and were such at all times hereinafter mentioned.

Plaintiff says that on or about the 30th day of December, 1947, the said defendant issued an insurance policy to plaintiff and entered into an agreement with the plaintiff in consideration of the payment of an agreed premium which plaintiff paid to defendant whereby defendant insured plaintiff against, and agreed to indemnify the plaintiff for, all loss sustained by the plaintiff during the period of three years beginning the 1st day of November, 1947,

through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, willful misapplication or other dishonest or fraudulent act or acts committed anywhere by any of the employes of plaintiff, acting alone or in collusion with others, including loss of money and securities and other property through any such act or acts of any of such employes, and including that part of any inventory shortage caused by dishonesty or fraud on the part of any employes of plaintiff.

Plaintiff says that on or about the 11th day of September, 1950, it discovered that a number of its employes had been guilty of larceny, theft, misappropriation, wrongful abstraction and other dishonest or fraudulent acts causing loss of property to the plaintiff, to-wit, meat products processed by the plaintiff in connection with its business as a meat packer and seller of meat products.

Plaintiff further says that said loss to plaintiff through the larceny, theft, embezzlement, misappropriation, wrongful abstraction, willful misapplication, or other dishonest or fraudulent act or acts of employes of the plaintiff, acting alone or in collusion with others, occurred during the period of three years beginning the 1st day of November, 1947, amounting to a loss of Eighty-two Thousand, Eighty-one Dollars and Ninety-four cents ($82,081.94) on fresh pork; Fifty-four Thousand, One Hundred Three Dollars and Eighty-nine Cents ($54,103.89) on smoked pork; and Ten Thousand, Three Hundred Ninety-two Dollars and Seventy-four Cents ($10,392.74) on sausage; or a total of One Hundred Forty-Six Thousand, Five Hundred Seventy-eight Dollars and Fifty-Seven Cents ($146,578.57). Plaintiff says that it was able to obtain from some of the employes through whose acts such loss was caused, the sum of Two Hundred Eight Dollars ($208.00) as partial restitution. Plaintiff says that under the terms of said policy of

insurance and indemnity agreement hereinbefore referred to, it notified defendant of said loss and filed sworn proof of claim as provided in said policy and indemnity agreement, and credited said defendant with said sum of Two Hundred Eight Dollars ($208.00) hereinbefore referred to making a net claim against said defendant in the sum of One Hundred Forty-Six Thousand, Three Hundred and Seventy Dollars and Fifty-Seven Cents ($146,370.57) under said policy of insurance and indemnity agreement.

Plaintiff says that said notice and sworn proof of claim were made as required by said policy and agreement and that plaintiff has done and performed all required of it under the terms of said policy and agreement, entitling it to receive from the defendant the amount of its loss aforesaid. Plaintiffs says that the defendant has failed and refused to pay the amount of said plaintiff's loss, and that more than ninety days have elapsed since proof of loss as required by said policy and agreement has been furnished defendant, and that at the time of filing the complaint herein less than two years have elapsed since the date upon which said loss was discovered by plaintiff.

Plaintiff says that by reason of the terms of said agreement and policy, plaintiff is entitled to be paid the sum of One Hundred Forty-Six Thousand, Three Hundred Seventy Dollars and Fifty-Seven Cents ($146,370.57) by the defendant, but that the defendant has failed and refused to pay said sum, to plaintiff's loss and damage against which said defendant insured and agreed to indemnify plaintiff all to plaintiff's damage in the sum of One Hundred Forty-Six Thousand, Three Hundred Seventy Dollars and Fifty-Seven Cents ($146,370.57), together with interest thereon from the date of demand of plaintiff, to-wit, the third day of January, 1951.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of One Hundred Forty-Six Thousand, Three Hundred Seventy Dollars and Fifty-Seven Cents ($146,370.57), together with interest at six percent (6%) per annum from the third day of January, 1951, until paid, and its costs herein expended.

. . . . . .

. . . . . .

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ANSWER

(Filed December 13, 1954)

Comes now the defendant, Manufacturers Casualty Insurance Company, and for its answer to plaintiff's second amended complaint herein filed on November 29, 1954, admits, denies and avers as follows:

1. Admits the averments contained in paragraph 1 of plaintiff's second amended complaint.

Answer

2. Admits that on December 30, 1947, defendant issued an insurance policy to plaintiff for which plaintiff paid a premium, but denies all other averments contained in the second paragraph of plaintiff's second amended complaint. Avers plaintiff has failed to correctly quote the provisions of the policy issued by defendant to plaintiff on December 30, 1947, and has omitted pertinent relevant portions of said policy.

3. Admits that on September 11, 1950, plaintiff discovered one of its employees committing a dishonest act which caused a depreciation in and loss of meat products processed by plaintiff, but specifically denies that any loss resulting to plaintiff from dishonest acts of its employees amount to One Hundred Forty-Six Thousand, Three Hundred Seventy and 57/100 ($146,370.57) Dollars and demands of plaintiff strict proof thereof.

4. Defendant denies the averments contained in paragraphs 4, 5 and 6 of plaintiff's second amended complaint except that it has failed and refused to pay plaintiff One Hundred Forty-Six Thousand, Three Hundred Seventy and 57/100 ($146,370.57) Dollars.

5. Defendant denies all averments contained in plaintiff's amended petition not herein specifically admitted to be true.

6. Defendant avers that in the policy issued to plaintiff, the maximum liability for loss arising from the dishonest acts of any identifiable employee shall not, in any event exceed Twenty Thousand ($20,000.00) Dollars and that if the insured be unable to designate the specific employee, the maximum of the company's liability for all loss arising because of the dishonest acts of undesignated employees shall not in any event, exceed Twenty Thousand ($20,000.00) Dollars.

Answer

7. Defendant further avers that under the policy provisions, if such loss consists in whole or in part of inventory shortage, plaintiff must prove conclusively that such inventory shortage was in fact due to the dishonest acts of one or more of its employees.

8. Defendant further avers that under Condition 6 of the policy issued by defendant, plaintiff was required as soon as practicable, but in any event not later than fifteen (15) days after discovery by the plaintiff of any loss or of any occurrence which may give rise to a claim, to give the company written notice thereof, at its home office in Philadelphia, Pennsylvania, and within four (4) months after such discovery to file with the company affirmative proof of loss daly sworn to and upon request of the company to render every assistance not pecuniary in its power to facilitate the investigation and adjustment of any claim exhibiting for that purpose any and all books, papers, vouchers bearing in any way upon the claim made and submitting itself and its associates in interest and also, so far as it is able, its employees to examination and interrogation by any representative of the company, under oath, if required, that plaintiff failed to give defendant written notice at its home office as soon as practicable and within fifteen (15) days after discovery of any loss or any occurrence which may give rise to a claim and failed to file affirmative proof of loss thereof and failed to otherwise comply with the provisions of Condition No. 6.

9. Defendant avers that its policy contained other terms, conditions and provisions, all of which are known to plaintiff and all of which are incorporated herein as if set forth in detail.

WHEREFORE, having fully answered, defendant prays that plaintiff's second amended complaint be dismissed.

PICKREL, SCHAEFFER & EBELING

By .....
Member of the Firm
608 Gas & Electric Building
Dayton 2, Ohio
Attorneys for Defendant.

Copy delivered to attorneys for plaintiff.

.....

SPECIAL VERDICT

(Filed December 16, 1954)

We, the Jury, herein do find the following facts:

1. That the plaintiff, The Sucher Packing Company, and the defendant, Manufacturers Casualty Insurance Company, are corporations and were such at all times alleged in the second amended complaint. Part

2. That on December 30, 1947, the defendant issued an insurance policy to plaintiff for which the plaintiff paid a premium, a true copy of said policy being plaintiff's exhibit No. 9 admitted into evidence. Yes.

3. That the plaintiff notified John L. MacBeth, agent of the defendant, by telephone on or about September 12, 1950, that it had sustained a loss. Yes.

4. That the plaintiff prepared a paper entitled proof of loss which is plaintiff's exhibit No. 11a, admitted into evidence, and that said proof of loss was received in the mail by the defendant company at its home office on or about January 5, 1951. Yes.

Special Verdict

5. That on September 11, 1950, William Harris and James Jackson were apprehended at the plaintiff's plant in an alleged act of larceny and as a result thereof, each was subsequently convicted of grand larceny; Yes.

6. That the defendant admitted by plaintiff's exhibits No. 17 and 20, admitted in evidence, that plaintiff sustained a loss in the amount of $291.14; Yes.

7. That the plaintiff withheld wages of employees in the sum of $208.00, and Yes.

8. That Helen Hurt, Robert Maiden and James Jackson were employed by the plaintiff on or before November 25, 1948. Yes.

William Harris

That William Harris was regularly employed by the plaintiff on or about July 26, 1950. Yes.

Was William Harris employed by the plaintiff at any time prior to the above date? Yes.

If so, give date or dates of previous employment. Week of April 26, 1950 3 days.

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of William Harris? Yes.

If you find William Harris committed any dishonest act or acts in violation of the terms of the policy of insurance which is the subject of this action, you will make a finding of facts upon the following things in relation thereto.

(1) The date or the time during which such dishonest act or acts occurred. July 26, 1950 to Sept. 11, 1950. The time of Wm. Harris permanent employment according to testimony. Including April 26, 1950, 3 days as evidence introduced by time card.

(2) The nature of the dishonest act or acts. Theft of Pork meats.

Special Verdict

(3) The number of hams, shoulders or bacon taken, if you find any were taken. See No. 8.

(4) The approximate weight in pounds, of each item. See No. 8.

(5) Were any such dishonest act or acts committed by William Harris alone, or in collusion with any of the following-named employees: James Jackson; Willie Early; Helen Hurt or Robert Maiden? Yes.

(6) If they were committed in collusion with any of the above-named persons, give the names of such person or persons. James Jackson.

STRIKE OUT EITHER 7 OR 8 OR BOTH OF THEM IF NOT APPLICABLE

(No. 7 is stricken out)

(8) We find that there is insufficient evidence to make a finding by preponderance of the evidence as to the number or approximate number of pounds of hams, shoulders or bacons taken by William Harris.

James Jackson

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of James Jackson? Yes.

If you find James Jackson committed any dishonest act or acts in violation of the terms of the policy of insurance which is the subject of this action, you will make a finding of facts upon the following things in relation thereto.

(1) The date or the time during which such dishonest act or acts occurred. Sept. 11, 1950.

(2) The nature of the dishonest act or acts. Theft of meats.

(3) The number of hams, shoulders or bacon taken, if you find any were taken. See note 8.

Special Verdict

(4) The approximate weight in pounds, of each item. See note 8.

(5) Were any such dishonest act or acts committed by James Jackson alone, or in collusion with any of the following-named employees: Willie Early, William Harris, Helen Hurt or Robert Maiden? Yes.

(6) If they were committed in collusion with any of the above-named persons, give the names of such person or persons. William Harris.

STRIKE OUT EITHER 7 OR 8 OR BOTH OF THEM IF NOT APPLICABLE

(No. 7 is stricken out)

(8) We find that there is insufficient evidence to make a finding by preponderance of the evidence as to the number or approximate number of pounds of hams, shoulders or bacons taken by James Jackson.

Robert Maiden

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of Robert Maiden? No.

If you find Robert Maiden committed any dishonest act or acts in violation of the terms of the policy of insurance which is the subject of this action, you will make a finding of facts upon the following things in relation thereto.

(1) The date or the time during which such dishonest act or acts occurred. See note No. 7.

(2) The nature of the dishonest act or acts. See note No. 7.

(3) The number of hams, shoulders or bacon taken, if you find any were taken. See note No. 7.

(4) The approximate weight in pounds, of each item. See note No. 7.

Special Verdict

(5) Were any such dishonest act or acts committed by Robert Maiden alone, or in collusion with any of the following named employees: James Jackson; William Harris; Willie Early; or Helen Hurt. See note No. 7.

(6) If they were committed in collusion with any of the above-named persons, give the names of such person or persons. See note No. 7.

STRIKE OUT EITHER 7 OR 8 OR BOTH OF THEM IF NOT APPLICABLE

(7) We find that there is insufficient evidence to make a finding by preponderance of the evidence that Robert Maiden committed any dishonest act or acts.

(8) We find that there is insufficient evidence to make a finding by preponderance of the evidence as to the number or approximate number of pounds of hams, shoulders or bacons taken by Robert Maiden.

Helen Hurt

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of Helen Hurt? No.

If you find Helen Hurt committed any dishonest act or acts in violation of the terms of the policy of insurance which is the subject of this action, you will make a finding of facts upon the following things in relation thereto.

(1) The date or the time during which such dishonest act or acts occurred. See note No. 7.

(2) The nature of the dishonest act or acts. See note No. 7.

(3) The number of hams, shoulders or bacon taken, if you find any were taken. See No. 7.

(4) The approximate weight in pounds of each item.

Special Verdict

(5) Were any such dishonest act or acts committed by Helen Hurt alone or in collusion with any of the following-named employees: James Jackson; William Harris, Willie Early; or Robert Maiden? See No. 7.

(6) If they were committed in collusion with any of the above-named persons, give the names of such person or persons. See No. 7.

STRIKE OUT EITHER 7 OR 8 OR BOTH OF THEM IF NOT APPLICABLE

(7) We find that there is insufficient evidence to make a finding by preponderance of the evidence that Helen Hurt committed any dishonest act or acts.

(8) We find that there is insufficient evidence to make a finding by preponderance of the evidence as to the number or approximate number of pounds of hams, shoulders or bacons taken by Helen Hurt.

Willie Early

We find that Willie Early was employed by the plaintiff on or about July 3, 1950.

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of Willie Early? No.

If you find Willie Early committed any dishonest act or acts in violation of the terms of the policy of insurance which is the subject of this action, you will make a finding of facts upon the following things in relation thereto.

(1) The date or the time during which such dishonest act or acts occurred. See note No. 7.

(2) The nature of the dishonest act or acts. See note No. 7.

(3) The number of hams, shoulders or bacon taken, if you find any were taken. See note No. 7.

Special Verdict

(4) The approximate weight in pounds of each item? See note No. 7.

(5) Were any such dishonest act or acts committed by Willie Early alone, or in collusion with any of the following-named employees: James Jackson; William Harris; Helen Hurt or Robert Maiden? See note No. 7.

(6) If they were committed in collusion with any of the above-named persons, give the names of such person or persons. See note No. 7.

STRIKE OUT EITHER 7 OR 8 OR BOTH OF THEM IF NOT APPLICABLE

(7) We find that there is insufficient evidence to make a finding by preponderance of the evidence that Willie Early committed any dishonest act or acts.

(8) We find that there is insufficient evidence to make a finding by preponderance of the evidence as to the number or approximate number of pounds of hams, shoulders or bacons taken by Willie Early.

Do you find that the plaintiff withheld from the defendant papers, books, vouchers or any records bearing in any way upon the claim made in this case, for which the defendant made a request? No

If so, what was withheld?

If you find that the plaintiff sustained any loss due to the dishonesty of any of the above-named five employees list the total amount taken by all employees, of each item in pounds.

POUNDS

_____ Ham

_____ Shoulders

_____ Bacon

We find insufficient evidence to determine any estimate of pounds taken by any of employes named

JUDGMENT ON SPECIAL VERDICT

This cause came on for trial before the Court and a Jury on November 29, 1954, both parties appearing by counsel, and the Court having directed the jury to find a special verdict, and the Jury having found such verdict, the Court directs judgment for the plaintiff on such verdict in the sum of Eighty-three ($83.00) Dollars.

It is hereby ORDERED, ADJUDGED and DECREED that plaintiff recover of the defendant the sum of Eighty-three ($83.00) Dollars with interest at the rate of six per cent (6%) per annum from January 3, 1951, and its costs of action.

Judge, United States District Court
Southern District of Ohio
Western Division

4 MR. GOLDMAN Your Honor, at this time the plaintiff moves the Court to have the jury view the premises.

9 THE COURT I will overrule the motion for view of the premises.

Testimony of James Jackson
DIRECT EXAMINATION

25 Q Will you state your name, please?
A James Jackson.
Q What is your address, Mr. Jackson?
A 534 South Broadway.

Q. Were you at any time an employee at the Sucher Packing Company?

A. I refuse to testify in view of the fact that what I might say might incriminate myself and I invoke the [26] Fifth Amendment of the Constitution of the United States.

Q. Isn't it a fact, Mr. Jackson, that you were involved in some stealing at the Sucher Packing Company?

A. I refuse to answer.

MR. GOLDMAN: What is Your Honor's statement in that regard? Constitutional privilege is well taken, is it?

THE COURT: May I see counsel at the bench, please?

(Court and counsel confer out of the hearing of the jury.)

Q. Mr. Jackson, isn't it a fact that you were involved in stealing from Sucher Packing Company over a period of time?

A. I refuse to answer.

Q. Didn't you admit to Detective Merica, in September, 1950, that you had been stealing from the Sucher Packing Company for a period of about five years?

A. I refuse to answer.

MR. GOLDMAN: I don't suppose there is any use in pursuing it any further, Your Honor.

THE COURT: You will be excused.

By William Harris:

DIRECT EXAMINATION

[27] Q. Will you state your name, please?

A. William Harris.

Q. Were you ever employed at the Sucher Packing Company?

A. That's right.

Q. Were you involved in any stealing at the Sucher Packing Company?

A. That's right.

Q. Mr. Harris, have you been convicted?

A. That's right.

Q. For that stealing?

A. That's right.

Q. Serve your time?

A. That's right.

Q. Now, Mr. Harris, tell what you know about the stealing, starting from the beginning.

A. Well, the whole time I was over there I seen a whole lot of stuff go. I done a whole lot myself. I helped to take a whole lot of it and I seen a whole lot of other stuff go through other people.

Q. Tell us about the part in which you were [28] implicated.

A. I helped to haul it. I helped to put it in barrels.

Q. About when did this start?

A. Along in 1948.

Q. And how did you get into the stealing?

A. Through Jackson.

Q. James Jackson, the man just left the court room?

A. That's right.

Q. What was your job at Sucher's?

A. Well, I was janitor, all over the place. I was working everywhere, in and out.

* * *

[29] Q. Tell us what you did, will you please?

A. I helped to put meat in barrels and I helped to haul it.

Q. When you put it in barrels, how was it disposed of?

A. Covered up with trash on top of it.

Q. How often did that occur?

A. It went on for almost two years, and some days I took as high as three trucks with four or five barrels on each time.

Q. Well, now how frequently did it occur?

A. Frequently –

Q. How often did it occur during that period?

A. Mighty near every day; every day we got a chance.

Q. Now, in addition to Jackson, could you name any of the other people who were involved?

A. Well, I don't know the other peoples names.

Q. Do you know the name of Robert Maiden?

A. Yes, I know him.

Q. Was he one of those who was involved?

[30] A. Yes.

Q. Do you know the name of Helen Hurt?

A. I know her.

Q. Was she one of the ones involved?

A. Yes, she was involved.

Q. How long were they involved?

A. They was there before I got there.

Q. Were they involved in the stealing when you started?

A. Yes.

MR. SELVA: If the Court please, we have refrained from objecting to leading statements, but we do so at this time.

THE COURT: I will sustain the objection.

MR. GOLDMAN: As to the last question, Your Honor?

THE COURT: Yes. I think it is too broad and calls for a conclusion, were they involved. What did they do?

Q. What did they do, Mr. Harris?

A. They helped do the same thing I did outside of hauling it.

Q. They did the same thing you did outside of hauling it?

A. That's right.

Q. What kind of meat was taken?

A Hams, shoulders, middlings, that's bacon, [31] and some parts of other meat you could slice and put in your pockets.

Q Was the meat you took pork or beef?

A Hams and shoulders and bacon. That is what I taken.

* * *

THE COURT: Well, if he knows, he can testify as to what he knows and I think give times that he is referring to.

MR. GOLDMAN: Your Honor, he said it was almost daily. He said "most every day" or words to that effect.

Q Put it this way, Mr. Harris: On the days that meat was taken away in the manner in which you have described, about how much was taken away?

MR. SELVA: We object.

THE COURT: I will overrule the objection.

MR. SELVA: Exception.

A Some days it was four or five barrels and [32] some days eight. I have took out eight in one day.

Q About how many hams would be in a barrel, if you had hams?

A Some of them, big ones, could put six in there; others could put eight or ten; that is according to size.

* * *

Q How much bacon was put in a barrel?

A Well, I would say you could put about twenty, twenty-five slabs of bacon in a barrel, if you pack it in right.

Q Were any pork loins ever taken?

A Pork loins, cut them up some, you can stick down in your pocket. I seen that. We never take no pork loins. I seen them take some away. We didn't. I didn't.

[33] Q You saw others take pork loins?

A That's right.

Q. Now how prevalent was the taking of meat by other employees?

A. I should say some every day left there.

Q. Now, on September 11, 1950, were you caught?

A. I was caught.

Q. What were you doing at that time?

A. I was hauling – driving a truck at that time.

Q. At that time you were hauling the truck?

A. That's right.

Q. That the trash truck?

A. That's right.

Q. What was the arrangement between yourself and the others who participated as to how you divided up, if you had any such arrangement?

MR. SELVA: We object, if the Court please.

THE COURT: I think you will have to limit it to what they did do with it, not what their arrangements were.

Q. What did you do with the proceeds?

A. I took it different places.

Q. You mean you took the meat to different places?

A. Yes.

Q. Now about the times you were not a driver, [34] when you were assisting without being the driver?

A. I just helped put it in the barrel. I don't know what all places it did go at that time. I just helped load into the barrels.

MR. GOLDMAN: Read the answer. I didn't get it.

(Thereupon the last A. was read by the reporter.)

Q. Well, what happened to this meat after it was taken to these other places? Was any money paid for it after the people got it?

A. There was money paid for it.

MR. SELVA: We object to these questions, unless this witness knows.

THE COURT: Find some time when he took it.

Q. I am referring now as to when you were the driver.

A. I collected money every time I took it.

Q. How much was your share when you were the driver?

A. Some days I got as high as $50 to $70, my part of it. They run two hundred and something.

Q. Now, when you were not the driver, you just helped put it in the barrels?

A. About $15 a day.

Q. You say $15 a day?

A. $15 to $18.

[35] Q. You stated that you saw a number of other employees, whose names you don't know —

A. That's right.

Q. (Continued) — take meat products and put it in their pockets, small quantities?

A. That's right.

Q. How often did you observe that?

A. Every day.

Q. How many employees? Could you estimate?

A. One-third of them.

MR. GOLDMAN: I think that is all, Your Honor. Just a moment until I inquire. (Consults with co-counsel.)

Q. Mr. Harris, you refer to items of fresh and smoked pork?

A. That's right.

Q. You helped to take away?

A. That's right.

Q. Did you ever take away any sausage?

A. I never took no sausage. There was some sausage taken. I never took sausage away. I always took big pieces, shoulders.

Q. Who took the sausage?

A. I know they work there. I don't know the people.

Q. Did you see it taken?

[36] A. Yes. Take them out and put them in the pocket, what they could carry in their pockets, you know.

Q. The people you saw take the stuff were other employees?

A. That's right.

Q. You don't know their names?

A. No.

Q. Do you remember, in connection with taking meat away by the barrel, you remember a man, Willie Early, a janitor over there?

A. I know him just a few days. I don't know much about him. He just there a short time.

Q. Was he one of those participated with you?

A. Yes.

MR. SELVA: I object, unless there is a showing that these people are not available.

THE COURT: He can testify to anything Early did he saw himself or knows about of his own knowledge.

Q. What did Willie Early do?

A. He helped load it.

Q. Any other persons besides Robert Maiden, Helen Hurt, Willie Early, James Jackson, yourself, that you can name?

A. They was all involved with me. Rest of them took it out in their pockets.

[37] Q. Those are the only ones involved with you?

A. That's right.

Q. And the others took it out in their pockets?

A. That's right.

Q. You say you don't remember the names of any of them?

A. No. I don't know their names.

Testimony of Kenneth Smith
DIRECT EXAMINATION

[53] Q. What position do you hold in Sucher Packing Company?

A. I am vice-president in charge of pork operations.

Q. Prior to the time you were vice-president in charge of pork operations, what position did you hold?

[54] A. Part of that time I was comptroller of the company.

Q. When did you first come to the Sucher Packing Company?

A. December 1947.

Q. And prior to December 1947, what was your experience, if any, in the packing industry?

A. I worked for the High-Grade Food Products Corporation for 18 to 19 years prior to that time.

Q. Does that company operate packing plants?

A. Yes, sir, it does.

Q. How many plants do they have?

A. At that time, they had perhaps in the neighborhood of 40 units.

Q. Forty different units?

A. Yes.

Q. What was your function with that company?

A. At the time I left them, I was in the executive office in New York for a year and a half, and prior to that time I was district comptroller, supervising accounting records and one thing and another for 13 different units, and prior to that time I had been at the Buffalo, New York plant. I started there in the plant and worked on various time studies and product tests, for a number of years. I was plant clerk.

[55] Q. What does he do?

A. Well, he has supervision of all clerical functions in the plant and makes various product tests, to determine shrinkages and product costs and what happened to the product values of the specific lots through the operation.

Q. While you were with the executive offices of High Grade, in New York, what was your function there?

A. Main function was to examine, or one of the main functions was to examine the product analysis reports from the different plants to determine any irregularities, items which might be questions, that we would want an explanation for in their operations, in general, consolidate their P. & L. statements.

Q. In your experience with High-Grade, did you come to learn about shrinkage of meat products due to evaporation?

A. Yes. We made various tests of the starting weight as compared to the sold weight. We would follow it right through from the beginning to the end of the operation and take several weighings through the operation.

Q. Let me ask you this, Mr. Smith, in December 1947, you say you came to Sucher Packing Company as comptroller?

A. That's right.

Q. What function did you have there in connection [56] with product analysis?

A. Well, I think perhaps the main reason I was employed there was to install a system to determine what was happening to the product, something that they could trace the product throughout to build up a cost system. Those records did not exist there prior to that time.

Q. Would you tell the Court and jury just what happens to the carcass of the animal after the same is slaughtered, taking it through the packing plant as it was done at Sucher's. Take pork, for example?

A. All right. We buy the live animal and slaughter it, and after it is slaughtered we have the dressed carcass which we weigh just prior to going into the cooler.

Q. Would you keep your voice up please, Mr. Smith?

A. All right. We slaughtered the animal and dress it on the cooling floor. The dressed carcass is [57] weighed.

Q. Will you describe what a dressed carcass is?

A. A dressed carcass is the animal with the head off and the insides cleaned out; the hair shaved off and passed Government inspection. In other words, we remove the intestine and the head and that is about it.

Q. In other words, the dressed animal is its condition after the exterior is removed and the inedible interior?

A. That is correct. In other words, that is the part of the animal in the case of pork, that we cut up into loins, hams, picnics.

Q. When you speak of a "picnic", what do you mean?

A. That is the shoulder part of the ham. The entire cut is known as skinned shoulder, that is comprised of picnic and Boston.

Q. Mr. Smith, at Sucher's what was done at the time you got there with respect to checking on what happened to meat products?

A. Well, first, I got there, we ordered numerous scales to place at various points throughout the plant where we could catch weights as the product entered the department. And then we closed up a lot of windows and changed the locks, several times, in fact, changed our watching system because [58] we were very concerned with the product getting away. At first we wanted to be sure we had definite controls established so we could determine just what was what.

Q. Now, how long was it before you had the system — that system of controls set up that you got there, do you recall?

A. Oh, it would be towards fall of 1948 before it was completed. Although, prior to that time in various departments, without having the entire system, we would make various test checks, more or less to train these people in clerical operation which we wanted done, but it would be towards the end of 1948 before it was functioning.

Q. After it was functioning toward the end of 1948 will you describe to the Court and jury just how the meat product was handled when it was weighed, what records were kept and so on?

A. First, we were concerned with the live stock that we purchased and we wanted to be sure that everything that we paid for we killed, or processed in our plant. So, we established a live stock summary book to tie in the accuracy of that record. The number of animals that the plant killed were reconciled with the number of animals purchased.

All right. Then, from that point we assured ourselves that we received everything that we paid for. Then [59] our next control was placed on the killing floor. That is what we call the hot weight scale where the carcasses go by one at a time and are weighed into the cooler.

Q. That is, the carcasses of the dressed hogs are weighed individually on the scale before it goes in the cooler?

A. That is right, and also on the cooling chain we have one of these trip counters that also counts the hogs as they go by to be sure we are getting the proper number.

Q. Keep track of every one?

A. That is right.

Q. Wht happened after the hog was weighed before it went in to be chilled and cooled?

A. I am afraid I did not hear you.

Q. What happened after each dressed hog was weighed before it went in to be chilled and cooled?

A. After it was weighed, next morning we would cut this animal up into primary cuts. Part of the products would go down to cure for further processing.

Q. What do you mean, go down to cure?

A. That would mean transfer to the curing where they would be placed in during fore parts for smoking.

Q. What parts would be for smoking?

A. The hams, the bellies, the picnics and that is about all.

[60] Q. Now, were the parts that were taken out to go to be cured, were they weighed?

A. Yes.

Q. Was a record of those weights kept?

A. Yes, a record was kept of each individual vat. In other words, they would be cured in vats holding 1400 pounds, and they would be weighed and counted into those vats, and also there would be various — or be quantities of fat taken off the animal which would be weighed and transferred to the lard department, which would be rendered into lard.

Q. Was the fat that was taken off and sent to the lard department weighed and a record kept of its weight?

A. Yes sir, it was.

Q. Now, what else transpired?

A. Well, the other cuts, such as the loins, and the Boston butts, would be held in the cooler for [61] shipment out that night. Incidentally, most of the shipping is in the night time. We process during the day. That is, a majority of the product is shipped out at night on our various routes. And then, at the same time, we were putting products in cure, we would remove products from cure that had been put down several days prior, and reached cured age, and that would be transferred up to the smoke house.

Q. Coming back to the still fresh meat, in addition to the parts that were taken to the curing department, and the parts taken to the lard department, were any parts taken to the inedible department?

A. Yes, there would be certain items that would be taken to the inedible department. And they would nominally be scrapings on the floor, any pieces, parts, of the animal or feet, or something like that, that we did not care to clean. In other words, the idea was that we weighed the animals into the cooler and everything we took off of those animals we wanted to catch the weight on, so that we could try to account for what went in the cooler.

Q. Now, the part that went to the inedible department was that also weighed?

A. Yes, sir.

Q. And a record kept?

A. Yes, sir.

Q. About what percentage of the fresh pork [62] retained its identity as fresh pork as distinguished from smoked or cured or lard or inedible?

A. That would consist of mostly your pork loins and your Boston butts and your spareribs, which would roughly be from one-quarter to one-third of the animal.

Q. You described now how the dressed hog was weighed and how the various parts that were taken to other departments were weighed and a record kept of the same. When was the remaining product, the loins and the spareribs and butts, you mentioned, when were they weighed again?

A. In the accounting system, we would charge the fresh pork department for the pork carcasses which it received. We would credit that department for the products we mentioned before which were weighed and transferred to other departments, either for lard or curing. Now, the credit to the fresh pork on the remaining would be credited to them

through sales invoices, as the product was billed out, then these sales invoices are analyzed and credited to the department involved. In other words, the pork would be credited to the pork department, the smoked to the smoked.

Q. Was the pork that was sold weighed before it was sold?

A. Oh, yes, weighed and check-weighed.

Q. Wat that weight recorded?

A. Yes, sir.

[63] Q. In your experience in something over twenty years in the packing industry, do you have any knowledge as to whether or not pork products shrink in weight through natural causes?

A. Yes.

Q. Would you describe what th t is?

A. Yes, when we weigh these ho s on the cooling chain, we obtain what we call a hot weigh t. That weight for cost purposes is shrunk three percent. That three percent provides for the cooler shrinkage and any cutting shrinkage you might have. In other wor ds, it is to take care of any shrinkage through the entire p ocess.

• • •

Q. Have you ever made any actual tests of pork products to determine the amoun of shrinkage?

A. Yes.

Q. Through this operati on?

A. Any number of tests because we are always pretty much concerned whether this shrinkage that we were allowing was adequate to take care of normal shrinkages and [64] we found that it has been more than adequate on the cooler shrinkage, that part that you lose through evaporation amounts to about one and three-quarter percent, whereas we make an allowance of three percent.

Q. Now, did the Sucher Packing Company keep records showing the weight of the animal as it would – so-called hot weight as you have described it, and directed to the various parts that were taken off and sent to other departments and sales weight?

A. Yes.

Q. And did they compute the actual amount left?

A. I am afraid I did not quite get your question. When you say "the actual amount left", that is the part I don't quite understand.

Q. Did you have records from which you could compute the amount that you should have left based on the weight that you mentioned and based on the normal or natural shrink that the product would naturally have?

A. Yes. We maintained those sort of records and they indicated that we were not getting all from the product we should be.

MR. SELVA: We object to the indication. They did maintain the records.

THE WITNESS: The records show. I will put it.

THE COURT: All right, with the correction he may [65] go ahead.

THE WITNESS: All right.

A. (continued) The records show that there were many shortages throughout the plant.

MR. SELVA: If the Court please, we move the answer be stricken because the records speak for themselves.

THE COURT: Sustain the objection. The answer may be stricken.

MR. GOLDMAN: Mark this as Plaintiff's Exhibit 1.

Thereupon a number of ruled sheets were marked for identification as **Plaintiff's Exhibit 1.**

Q. I hand you, Mr. Smith, what has been identified as Plaintiff's Exhibit 1, and ask you to describe what this sheaf of papers is?

A. All right. This is our live stock summary.

Q. What does it show?

A. On this record it shows the various lots of animals which were killed during the week. It also reconciles the kill with the animals that we purchased.

Q. What is the purpose of that reconciliation?

A. The purpose of that reconciliation is to ascertain we were starting out on the correct foot, with the correct weight. We have tied it up at two points.

Q. What else does the record show?

A. The record shows the dressed weight of the animals that were slaughtered, during that week of its operations. It shows the number of animals that were purchased and the live weight, and the dressed weight. It also reconciles it into our voucher register.

Q. I notice some items marked "credits". What are those?

A. Those are official credits. That is, credits for the hearts, and livers, and the items that are removed during the killing process. In other words, they are credited to the original cost of the live animal and what is left is the cost of the dressed animal.

Q. And for what period of time does this particular exhibit cover?

A. This particular exhibit covers from January 15, 1949 until the week ending October 7, 1950.

MR. PICKREL: How many pages, please, in that exhibit? Don't you have them numbered?

THE WITNESS: No. They are not numbered. They are dated.

MR. PICKREL: What are those dates?

THE WITNESS: Week ending January 15, 1949 through week ending October 7, 1950.

Q. Would you take off the sheets after the week ending September 9, 1950?

A. All right. (Witness does as requested by counsel

MR. PICKREL: Just goes to September 9th then?

MR. GOLDMAN: I am taking off the others because they will relate to other figures we are going to offer.

I wonder if you would mind remarking this much of it

Thereupon a number of ruled sheets were marked for identification as **Plaintiff's Exhibit No. 1-A**

* * *

[69] Q. Mr. Smith, under whose supervision were those records made up?

A. The biggest part of them were made under my supervision. I do not just recall the day Mr. Solomon became comptroller.

Q. As the vice president in charge of pork operations these records are in your custody and control for that department?

A. Yes. They are vitally interested in them.

* * *

[70] Q. I hand you a group of documents opposing counsel has had these, your Honor ask you what those are?

A. These are product analysis reports.

Q. What period of time is covered by the papers that you have there?

A. Starts December 4, 1948.

Q. Is that the week ending December 4th?

A. That is the week ending December 4th through October 22, 1949.

Q Now, will you tell us what these papers contain?

A Yes. That is a product analysis report that analyzes the movement of the product throughout the plant. The first column here is the opening inventory. The next column is purchases, a part of which came from this live stock summary, and then there is transfers in and out of the departments.

Q When you speak of transfers in and out of the department, are those the transfers you referred to, curing department, lard and so on?

A That is correct. The other column is sales and closing inventory. Each period these purchases and sales are tied in with our general ledger to be sure of the accuracy of the figures on this analysis report.

[71] Q And are the figures on the transfers taken from the actual records of weights?

A That is right. They are taken from the movement of product at the time and the big movement of product is from pork to curing department, and in curing department we have an additional check inasmuch as we make a cut check, and everything that is charged to that department has to be transferred out.

Q Is smoked pork also covered on those sheets?

A Yes, it is.

Q When is the smoked pork weighed?

A The smoked pork is weighed after the smoking process. In other words, it enters the smoke process as a cured ham and piece of bacon, or picnic, and comes out as a smoked product, at which time it is weighed and placed in a cooler for sale, to be packed into orders. That product is sold both unwrapped and wrapped. We try to catch the flow of products in the smoke to take care of the items that we anticipate shipping that particular night, and, I say, product goes out both wrapped and unwrapped, and the next day it is wrapped and placed in boxes.

Q. I see. As to smoked pork, you maintain the record of weight as it comes out of smoke; is that right?

A. That is correct. And we are also able to compare the record which comes out of smoke with the record [72] which comes out of cure, to be sure that the product is all accounted for at that point.

Q. Now, is there a certain amount of natural shrink in the smoked product, as well as the fresh product?

A. Yes. There is a natural shrink from the time it comes off the smoke until it is ready for sale. That shrinkage varies from one and one-half to possibly two percent.

Q. Have you ever made any tests in your years of experience with High Grade and at Sucher's, as to the amount of natural shrink that pork products will undergo?

A. When you say "pork products", you mean smoked pork products?

Q. Smoked products.

A. Yes. The first day it will go from three-quarter percent to one and one-quarter percent, and the following day maybe one-half percent. Of course, in operation of business you try to hang, for instance, on Monday what you figure you will ship out on Tuesday night, so you move your product out promptly. That that does not move out Tuesday night is usually wrapped to go out the following day.

Q. I take it the product goes out 24 to 36 hours after it comes out of soak?

A. Yes, that is right.

[73] Q. In actual practice, was that done at Sucher's?

A. Yes, very close to that time.

Q. Now, Mr. Smith, are there some other basic records from which this weekly product analysis sheet is taken?

A. Well, of course, your purchases and sales are taken from your books of account, and any transfers they are

based on individual transfers at the time the inventories . . . from weekly inventory records. While the product in all cases other than inventory is weighed, the inventory is not weighed in all cases.

MR. GOLDMAN: Mark this for identification as Exhibit No. 2.

Thereupon a file containing a number of documents was marked for identification as **Plaintiff's Exhibit No. 2.**

Q. Mr. Smith, I have had put in this folder the weekly products analysis sheets for the week ending November 4, 1948 to the week ending October 22, 1949, marked as Plaintiff's Exhibit 2. I will ask you if, for each one of these weekly sheets, there is a folder of papers forming the basis of some of the information contained therein?

A. That is correct.

MR. SELVA: Has that been offered as an exhibit?

MR. GOLDMAN: No, not yet. It has been marked [74] only.

Q. I hand you a file of papers, which I will ask the reporter to mark as Plaintiff's Exhibit 3, and ask you to state what is in that folder, what record?

Thereupon a folder containing a number of documents was marked for identification as **Plaintiff's Exhibit No. 3.**

MR. PICKREL: May I inquire, did he keep that record that he has in front of him?

Q. May I ask under whose supervision that record was kept?

A. These records were kept under my supervision

MR. PICKREL: You did not keep them yourself. You have an accountant or bookkeeper or checker that does it?

THE WITNESS: Yes. They are accumulated from several sources. In the office, they would be proved out more or less.

MR. GOLDMAN: Keep your voice up.

THE WITNESS: They are accumulated from many sources in the plant, but then they are all consolidated at one point in the office. For instance, this first group of records are inter-departmental transfers from one department to another.

MR. PICKREL: Now, right at that point. . . . I am sorry to interrupt . . . do you know that the figures in that group of papers, yellow paper you just held, are correct? [75] Did you ever check them?

THE WITNESS: Yes, I have checked many loads through. I haven't checked every individual load, but you check all operations through a plant as you go through it.

MR. PICKREL: I know. You are checking a lot of things here now.

MR. GOLDMAN: I wonder if Mr. Pickrel could reserve his cross examination until the conclusion of the direct testimony?

MR. PICKREL: I would like to know the beginnings of all these things, not the endings. He has the endings.

THE COURT: I do not think it is necessary that you should personally know every entry on all the documents here that he supervised.

Q. Will you continue, Mr. Smith, telling what documents are there, if they were kept under your supervision?

A. Yes. This next group of records is sales analysis.

MR. PICKREL: Is that for a week or month?

MR. GOLDMAN: In each one of these folders are the papers for that particular week.

MR. PICKREL: One week?

THE WITNESS: One week. That comes from the invoices which were filled on each particular day. There is [76] one sheet for each particular day.

This next group of records are weights of products as it comes off smoke. This is a work sheet of the accountant reconciling from vats in and out of the curing department. This is a record taken of the purchases, taken from the live stock register. This is another reconciliation by the accountant.

MR. SELVA: If the Court please, we object to the live stock records for the same reason that this inventory, or computation, submitted to us starts with the carcass weight processed. Am I correct in assuming that is the beginning point?

MR. GOLDMAN: The live stock weight is relevant insofar as it is double checked against the dressed weight, and the purchases are checked against live stock to account for the number of animals. It is a double check against the dressed animal, the weight of the live stock is not involved, only the number. You understand, Mr. Selva, what I have in mind?

MR. SELVA: I thought we started with the processed weight.

MR. GOLDMAN: That is correct. We do. But these records are supporting . . . partly supporting data because the live stock records show the number of cattle purchased and the number of cattle or hogs, as the case may be, can be [77] then checked against the dressed hogs as a double check against the weights, to make sure you have not left any out. That is the purpose of this. It is corroborating data. It is not directly involved in the computation of the weight, but it is for corroboration.

Q Will you continue, Mr. Smith.

A That is a record of the fats that went to the lard tank. These are records of the various sausage items made during that week. This is just an analysis of the price fluctuations during the week, I would say.

Q That was not transcribed onto the

A No. This was just taken from the records. For instance, they show quantity, inventory, price, market price, gain or loss. In other words, it is a record to show whether your inventory value is over or under stated as far as current market value is concerned.

Q That is not involved in the weights?

A No. This is a consolidation sheet for these various inter-departmental transfers. This is a recapitulation of the transfers during the week, by days. In other words, that is from pork to sausage, from beef to sausage, from pork to cure and from cure to smoke.

Q That is a double check of the previous papers?

A No. They are summarized on this sheet.

Q Summarized?

[78] A. Just a record here to show the number of lard tins we used that week. This is a preliminary report of what our gross profit amounted to.

Q That is not involved in the

A No. It is just a preliminary report. This is an analysis of the payroll by departments.

Q Then that is also not involved?

A This is a recapitulation of the inventory. These are the inventory sheets as they come from the plant. They are entered on this sheet in the office to transfer to the product analysis report.

Q This sheaf of papers constituting a number of papers is the actual inventory record?

A That is right.

Q For that week?

A That is correct.

Q As I understand you then, for each week for which there is a product analysis sheet in this folder, Exhibit 2, there is a folder of the kind you have in your hand, which constitutes the data, the more primary data, from which the figures on the product analysis sheet is made up?

A That is correct.

Q So that for the 47 weeks, from week ending December 4, 1948 to October 22, 1949, contained in Plaintiff's [79] Exhibit 2, there are 47 folders of the kind you have in your hand to match up with it?

A That is right.

MR. GOLDMAN: Would you mark this, please, Exhibit 4?

Thereupon a folder and its contents were marked for identification as **Plaintiff's Exhibit No. 4.**

Q I hand you a folder which has been marked as Plaintiff's Exhibit 4, and ask you what that is?

A This is a group of product analysis reports covering the period week ending November 5, 1949 through week ending September 9, 1950.

Q And am I correct in saying that for each one of those sheets, for each week there is a folder of the kind Plaintiff's Exhibit 3 matching up with that, with the primary data from which the product analysis sheet is taken?

A That is correct.

Q So that for the period from week ending December 4, 1948 to September 9, 1950, there would be 95 folders of this kind, is that right?

A That sounds like the number of weeks.

Q I think there are 47 and 48.

MR. PICKREL: What week is that for, your Exhibit

MR. GOLDMAN: Exhibit 3 is for the week of [80] the 19th of December, 1949.

MR. PICKREL: 12/19/49. Everything but a weather report.

MR. GOLDMAN: Like to offer in evidence, your Honor, Plaintiff's Exhibits 2 and 4, the weekly product analysis sheets.

MR. SELVA: If the Court please, subject to further examination, we probably have no objection, but we would like to check them further. We have had them since noon.

MR. GOLDMAN: Now, wait a minute.

THE COURT: I will withhold passing on them until they have a chance to examine them.

MR. GOLDMAN: Their accountant has had these records a long time. He saw these records a long time ago.

MR. SELVA: Well, at least we may examine them.

Q. Mr. Smith, what precautions or action of any kind did the Sucher Packing Company take during the period that you arrived at Sucher Packing Company until September of 1950, in an endeavor to prevent theft?

MR. SELVA: If the Court please, we object to the conclusion. Only those precautions of which this gentleman has knowledge would be proper.

THE COURT: Within the limits of his knowledge.

Q. Within the limits of your knowledge, Mr. [81] Smith?

A. We knew thefts were occurring.

MR. SELVA: If the Court please, we move

THE COURT: That may be stricken.

Q. Just tell us what was done, not what you knew.

MR. PICKREL: If he knew thefts were occurring that is very interesting.

THE WITNESS: Shall I answer that?

MR. GOLDMAN: That was a comment of counsel. I don't think it was a question.

THE COURT: Answer Mr. Goldman's question.

MR. GOLDMAN: Just answer the question asked.

A. All right. First, we tried to detect likely places where product could be gotten away with. We boarded up windows and cemented in doors and closed them to reduce the number of exits and entrance places to the plant. We changed all locks, and we hired several detective agencies. We changed our watching staff. At one time we had our watchman assigned other duties, but we figured we would eliminate these other duties. We had them perform and we had them do nothing but stand watch this disappearance of product, other than through normal channels. We placed a dock checker at the door where customers would come up and pick up the products and check them out, to be sure that [82] everything was billed.

Q. Before you took these precautions, was there any instance which occurred which gave rise to your doing so?

A. We received many anonymous calls at the

MR. SELVA: If the Court please, that would be hearsay, these anonymous calls that were given to this gentleman.

THE COURT: Sustain the objection.

MR. GOLDMAN: Leave out the anonymous calls.

A. (continued) Walking through the plant, we would notice things.

MR. SELVA: If the Court please.

THE COURT: Just a minute, please. Confine this to what you saw when you were walking through the plant.

MR. GOLDMAN: Refer to yourself then, what you saw, Mr. Smith.

A. In walking through the plant, we noticed trees of hams with maybe one or two hams missing.

Q. Will you explain what you mean by "trees" of hams?

A. It is a rack on overhead rollers on which we hang hams to roll them into the smokehouse during the smoking

process, and when we would put them out there would be . . . hams would be evenly spaced, that would be five hams to a side. They would come out of smoke that way and would [83] come through the cooler. At times I would notice two or three hams missing from a rack, which would have no business to be missing, because the rack as it would go through process would be moved in its entirety, take the whole tree of hams down to the shipping department. We would notice boxes of sliced bacon open with some missing, which would have no reason for being open, because the items were sold in standard sealed packages. I remember one day we killed 14 calves, and the calves' livers were . . .

MR. PICKREL: Pardon me.

THE COURT: Just a minute. I believe there is no claim of any beef shortage.

MR. GOLDMAN: He is giving that as an illustration as to what gave rise to their taking precautions.

THE COURT: All right.

A. (continued) Well, we killed 14 calves that day and veal livers were very scarce and very much in demand. We promised 14 customers veal livers. When they went to fill the orders, there were only 11 veal livers. Three had disappeared within a reasonably short time.

Q. Any experience that you know of, of your own knowledge, with respect to sweetbreads?

A. Yes, we had some cases of that on sweetbreads, too. That was also an item . . . in fact, that happened at about the same time, within a week or two of that. We killed [84] so many animals and part of the sweetbreads would be missing. Those would be items that would be easy for anybody to put in their pocket and get away with and they were a delicacy.

* * *

[85] Q. Mr. Smith, yesterday you had testified concerning the basic data from which the weekly product analysis sheets were made up?

A. Yes, sir.

Q. And I believe you said there was a folder similar to Plaintiff's Exhibit 3 for each week of the 95-week period we were talking about?

A. That is correct.

Q. I will ask you if you had s[illegible] down this morning those folders for each of the 95 we[illegible]?

A. That is correct.

Q. I hand you a box containing a group of folders. What folders are these, for what weeks?

A. They cover the period from December 1948 to week ending October 15, 1949. I think in that box there, [86] that particular box there, is from December 25th. I believe some earlier folders for December are around here.

Q. I hand you another box and ask you what is in there?

A. This particular box contains the folders for weeks ending November 5, 1949 to May 13, 1950.

Q. I hand you still a third box of folders, and ask you what that contains?

A. That covers the period for week ending May 20, 1950 to September 9, 1950.

Q. Mr. Smith, with the folders in the three boxes just shown you, can the weekly product analysis sheets for the 17 weeks period ending October 22, 1949, the 48 week period ending September 9, 1950 be checked and verified?

A. Yes sir, they can, with those folders, with the addition of the live stock summary book.

Q. That was the charge sheets that—

A. That is correct.

Q. So, from the folders in the three boxes, plus the live stock summary sheet, Plaintiff's Exhibit 1-A, all of the fig-

ures in the weekly product analysis sheets in Exhibits 2 and 4, can be verified and checked?

A. That is correct.

MR. GOLDMAN: Mr. Pickrel mentions there are several of these sheets missing. Do you know offhand which [87] ones? We will look for them.

MR. PICKREL: No, I don't.

MR. GOLDMAN: We will look over them and if we find any missing we will supply them.

Q. Now, Mr. Smith, from your weekly product analysis sheets, taking a sample from Plaintiff's Exhibit 2, the week ending December 4, 1948, does that sheet tell you where all of the parts of the pork carcasses that were the result of the slaughter during that week, went to?

A. Yes, sir, it does.

MR. PICKREL: That is part of Exhibit 2, isn't it?

MR. GOLDMAN: Yes, that is part of Exhibit 2.

Q. Now, I wonder if, for illustration and better understanding of what we are talking about, Mr. Smith, I wonder if you would come over to the board. Keep your voice up so the reporter can hear you and the Court and jury can hear you. Indicate on the board the manner in which the product analysis sheet shows what disposal is made of the hog carcass.

A. (witness does as requested by counsel.) We start with the dressed hog. Some of these hogs are sold as whole carcasses, so we will deduct those, and the balance is cut up. Those that we cut up the following day into hams, loins, shoulders, picnics—

Q. Will you describe what a picnic is?

[88] A. Picnics is from the shoulder of the hogs to the front part where the joint is and then going back to the plate, that is the Boston butt. This shoulder includes both of these cuts. Sometimes they are sold fresh as shoulders

and sometimes they are further cut up into picnics and Boston butts, the picnics going to smoke and the Boston butts being sold as a fresh item. Bellies, trimmings and fats.

MR. PICKREL: No bacon?

THE WITNESS: That is belly. The trade name for that in the trade is bellies. After it is smoked it becomes bacon.

Of the dressed carcass, the hams are approximately 18 percent; the loins 13 percent. 4 percent will go into shoulders; 6 percent into picnics; 5 percent into Boston butts; 15 percent into bellies; 7 percent into trimmings; fat will be 22 percent, and then miscellaneous cuts there are approximately 10 percent. The miscellaneous cuts consists of jowls, feet, spareribs, neck boner and tails.

MR. PICKREL: Boston butts is all one thing?

THE WITNESS: Yes.

A (continued) All right. Now, after the cut, certain of the product is disposed of immediately, that goes to sausage, lard and inedible; that is a by-product.

Q. When you refer to inedible—

[89] A. Something not for human consumption. And we render it, inedible product, as grease.

MR. PICKREL: Where did you say those last three things came from?

MR. GOLDMAN: Inedibles.

MR. PICKREL: Sausage, lard and inedibles, what do they come from?

THE WITNESS: Well, I will try to show you. The trimmings here will be transferred to the sausage department.

MR. PICKREL: Well, do they come from the trimmings?

THE WITNESS: That's right. As they produce these various cuts, for instance, the belly comes out of a hog, it

is rough. It has to be trimmed up. That is known as trimmings. Same thing is true of shoulder, it is rough cut. When they are trimming off the ham, they are called "ham trimmings".

MR. PICKREL: Those three things that you wrote up there, sausage, lard and inedibles, they all come from the trimmings?

THE WITNESS: No.

MR. GOLDMAN: He will explain it, Mr. Pickrel, and if you are not clear when he is finished, I will suggest you wait until your cross-examination to ask the questions.

MR. PICKREL: I would like to know.

Q. You explain from what parts the sausage [90] comes from.

A. 7 percent of the dressed weight is transferred to the sausage department as trimmings used in the further manufacture of sausage. The fats, which amounts to 22 percent, are transferred to lard department for rendering into lard.

MR. PICKREL: All of them?

THE WITNESS: Yes, sir.

MR. PICKREL: Okay.

A. (continued) Out of this miscellaneous item there is hind feet which approximates 2 percent of the dressed weight that we transfer to inedible.

Q. Mark it "inedible 2 percent".

A. All right (witness does as requested by counsel). We have another department in the processing for smoked. In other words, we take this fresh meat in its original state and cure it and process it to smoked, of that we will take 16 pounds a hundred, or 16 percent of ham.

MR. PICKREL: Of what?

THE WITNESS: 16 percent of the dressed weight of the hog will be hams for smoking.

MR. PICKREL: Of the whole—

THE WITNESS: On the picnics 5 percent of the whole hog will be used for smoking, to make smoked picnics out of them. The bellies, they will go practically entirely [91] for smoking, which is 15 percent. This miscellaneous item, there will be jowls, which is 2 percent of the hog, for further processing ultimately to be smoked. That leaves the balance of that product as available for fresh sale. That would be 2 percent of the hams. In other words, the majority of the hams that are produced are further processed for smoked hams, but there is a small percentage that is sold for fresh ham. The loins, practically entirely for fresh sale. Shoulders, they are entirely for fresh sale. There is 1 percent of the picnics, or 1 percent of the dressed hog in picnics, that is available for fresh sale. Boston butts are all for fresh sale. On this miscellaneous item, here that leaves about 6 percent that would be part of the feet, spareribs and the neck bone. Now, if I total these up, it totals up to a hundred percent. That is the approximate distribution of the hog as it is cut up through our plant.

MR. PICKREL: Now, wait a minute, please. What is that 31 percent?

THE WITNESS: That is the total of these.

MR. PICKREL: Is that the smoked?

THE WITNESS: There is two 31 percents here.

MR. PICKREL: Well, what is the first one?

THE WITNESS: The first one consists of 7 pounds of trimmings.

[92] MR. PICKREL: Was it generally—is it smoked or sausage?

MR. GOLDMAN: He says it consists of several items. If you will let Mr. Smith tell you what it is, I think you will understand it.

THE WITNESS: That 31 percent is made up of 7 percent trimmings, 22 percent fat that goes to lard, and 2 per-

cent of miscellaneous items, jowls that are skinned for sausage. No, wait a minute. .2 percent is hind feet and stuff that goes to the inedible tank.

Q. In other words, 7 percent goes to sausage, 22 to lard and 2 percent to inedibles of the first 31 percent?

A. That is right.

MR. PICKREL: 7 percent is sausage.

MR. GOLDMAN: 22 percent lard, 2 percent inedible.

THE WITNESS: I meant that 7 percent trimmings for sausage. It is not sausage. Sausage is a finished product. This is a raw product going into the manufacture of sausage.

MR. PICKREL: It eventually gets into sausage?

THE WITNESS: It becomes sausage when it is completely processed.

MR. PICKREL: Now, the next 38—what is the 38? That is all smoked stuff, isn't it?

THE WITNESS: No. That is product being [93] processed for smoking. It is not smoked in that state.

MR. PICKREL: But that is where it is—

THE WITNESS: It naturally will wind into smoked, yes.

MR. PICKREL: All right. And the other 31, is there any name for that?

THE WITNESS: Yes. That consists of hams, loins, shoulders, picnics, Boston butts. Then the miscellaneous small items, spareribs, neck bones, and so forth, for fresh sale.

MR. PICKREL: Sold as is, without anything done to it. Is that right?

THE WITNESS: That is correct.

MR. PICKREL: That is all I want to know.

Q. That would be called "fresh pork"?

A. That is right.

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Testimony of Mr. A. O. Paul

DIRECT EXAMINATION

[94] Q. What is your name?

A. A. O. Paul.

Q. What is your address?

A. 702 Wilfred Avenue, Dayton, Ohio.

Q. What official position do you hold in Montgomery County?

A. Clerk, Common Pleas Court.

Q. And as such, are records of criminal convictions in your custody and care?

A. They are.

MR. PICKREL: Now, pardon me. I think I know what you are after and I should like to see these papers before you get into them.

MR. GOLDMAN: I have no objection to counsel looking at the papers. They are public records anyhow.

Q. (after Mr. Pickrel had looked at the papers.) I hand you, Mr. Paul, two papers and I will ask you if those two papers are among the papers in criminal cases under your jurisdiction as Clerk of the Courts of Montgomery County?

A. They are.

MR. SELVA: We object to these papers, [95] individually and generally as it does not constitute a part of the plaintiff's claim and the papers are otherwise incompetent.

THE COURT: Let me see them. Mr. Paul (after the Court had examined the papers.) May I see counsel at the bench, please?

(Counsel enter with the Court at the bench, out of the hearing of the jury.)

THE COURT: I will overrule the objection.

MR. SELVA: Exception.

MR. GOLDMAN: What was the question, please? (thereupon the last Q. was read by the reporter.)

Q. To what individual do those papers refer?

A. William Harris and James Jackson.

MR. GOLDMAN: I would like to offer these in evidence, your Honor, with the privilege of substituting copies so the original records may be returned to the Clerk's office.

MR. PICKREL: What is the paper, a letter or an indictment or an affidavit?

Q. Will you describe what the papers are, please, Mr. Paul?

A. This is an indictment by the Grand Jury, filed November 21, 1950, in the Clerk's office against William Harris and James Jackson.

[96] Q. What is the other paper, Mr. Paul?

A. The other paper is an entry which was filed in which James Jackson plead guilty to grand larceny.

THE COURT: They may be offered in evidence with the privilege of substituting copies after the case is over.

MR. SELVA: Note our exception, please.

THE COURT: The Clerk has certified copies of those two documents. Is it satisfactory with counsel that the certified copies be substituted now?

MR. GOLDMAN: That is perfectly agreeable, your Honor.

MR. SELVA: Yes.

* * *

Testimony of Kenneth Smith

DIRECT EXAMINATION (Continued)

[99] Q. In the final column, out for sale 31 percent, the items of the fresh pork remaining of the hog carcass, which are held for sale; is that correct?

A. That is right.

[100] Q. In your weekly product analysis sheet are the disposition of the various portions of the carcasses by weight shown with respect to transfers to lard, to inedible, for processing, for smoked?

A. That is right.

Q. And for sausage?

A. That is correct.

Q. And can you tell by subtracting the amounts by actual weight which have been transferred to other departments from the original weight, the amount that you should have left?

MR. PICKREL: To which we object as to whether he can or not. Did he?

A. Yes sir. The sheets analyze the operation in that form. We start off with our dressed hog's carcass and we show everything we take away from that for further processing and the remainder is what is left as fresh sale. These figures I have shown here are the approximate figures. The weekly sheet show the exact figures, what was done.

Q. Those figures on those sheets, the figures of reported actual weights?

A. Yes they are.

MR. GOLDMAN: You may resume the stand.

(The witness does as suggested by counsel.)

Q. I believe yesterday, Mr. Smith, that you [101] stated that in your computations you figured a certain amount for natural or normal shrink?

A. That is correct.

Q. I believe you testified about that?

A. Yes, sir.

Q. And, in your experience, what is the amount of normal or natural shrink to which fresh pork would be subjected?

MR. SELVA: We object to that unless he describes the factors under which he has determined that, whether or not that is determined at Sucher's, Swifts or Armours.

Q. Confining yourself from your experience at Sucher's.

A. At Sucher's we have made several tests to determine — that is, from time-to-time, to determine what our cooler shrinkage is, and the way we conducted those tests was to weigh the hogs at the time they went into the cooler. The same hogs were reweighed just before cutting to see — to determine how much the hogs shrunk in the cooler and the average shrinkage there would be approximately one and three-quarters percent.

Q. When was your experience accumulated at Sucher's?

A. My experience was accumulated during the last seven years.

[102] Q. Now, Mr. Smith, is there any additional shrinkage due to natural causes after the cutting — the processing, rather?

A. Yes. During the processing and cutting there is small shrinkages, bone dust and, oh, maybe miscellaneous items that might drop on the floor, a piece of fat, or something stick to the man's knife when he cleans it up, and that runs approximately one-fourth of 1 percent.

Q. Is there any additional shrinkage after it is cut prior to the time it is weighed for sale?

A. Yes. There will be shrinkage. Of course we do everything to prevent that.

MR. PICKREL: Now, please, —

Q. Just tell us how much shrinkage you experienced from your observations, and tests, at Sucher's through the natural means?

A. The normal and natural shrinkage should not exceed 3 percent, which we originally allowed in our tests.

MR. PICKREL: Now, pardon me.

Q. I am now talking, Mr. Smith, about the – not the total shrinkage, but the shrinkage, after – if there is any shrinkage after the animal is cut up and after it has had the cooler shrinkage and the quarter percent, which you say will occur in the actual cutting process.

A. Well, that leaves 1 percent of the carcass [103] weight. However, a number of the items are almost immediately weighed, in a very relative short time, so the shrinkage on those items, as far as fresh pork is concerned, stops at that time. And although it has 1 percent remaining shrinkage on the pork available for sale, would be a larger amount, because some of those items you weigh almost immediately and, of course, there is no further shrinkage as far as the pork department is concerned on those items.

Q. I asked you the items that are weighed immediately after the cutting. Take the total shrink on those would be one and three-quarters percent plus a quarter percent, or a total of 2 percent.

A. That is right.

Q. As to those items that are not weighed immediately, what proportion of the total are those?

A. Well, that would be in the neighborhood of 3 percent on the items remaining.

Q. You don't understand me, Mr. Smith. I am not talking about the amount of shrinkage you allowed in the claim. I am now talking about in actual experience what percentage of the total amount of the fresh pork for sale is not weighed immediately. I am talking about the shrink

now. I am talking about the percentage of total fresh pork available for sale.

[104] A. That would be approximately — answering one question, the fresh pork available for sale would amount to approximately 30 percent.

Q. Now, you say some of that is weighed immediately.

A. No, not of that part available for sale.

Q. I see. The other items are weighed and transferred — the parts weighed immediately are the parts transferred to the other departments?

A. That is correct.

Q. And approximately 30 percent then is not weighed immediately, but weighed at the time of sale?

A. That is correct.

Q. Well, how much shrinkage occurs as to the part that is held for sale between the time of cutting and selling?

A. Oh, there would possibly be 1 percent.

[105] Q. The shrinkages, to which you have been testifying, Mr. Smith, are those the shrink that you actually experienced at Sucher's?

A. That is correct.

Q. Now, with respect to smoked pork, when was, during the period in question, the smoked pork weighed?

A. The smoked pork was weighed when the smoking process was completed.

Q. Did you say when the smoked process was completed.

A. That is right.

Q. Was that weight recorded in your product analysis sheets?

A. Yes, sir. That is the weight in the weekly folder.

Q. And when was that product next weighed?

A. Well, that product would next be weighed at the time of sale on invoices.

Q Now, in your experience at Suchet's, what was the normal or natural shrink? I should ask before that, was there a normal or natural shrink in fresh pork between the time smoking is completed and the time of sale?

A You mean from the time smoking is completed until the time of sale?

Q Yes.

A Oh, one and a half to two percent.

* * *

[107] Q Mr. Smith, with respect to sausage, is there a normal or natural shrink that occurs in sausage after it is manufactured before it is sold?

A Yes, there is. The sausage is weighed right [108] out of the process in bulk quantities, and then when that is repackaged into small 10 and 6 pound units, 1 pound units, there is a shrinkage in both the weighing and normal shrinkage.

Q Is the sales weight the same as the latter weight that you describe?

A Yes. The next weighing on the smoked meat would be the sales weight. That is, other than the weighing of the individual packages, such as 1 pound packages, 6 pound packages or 10 pound packages.

Q You said smoked meats. Did you mean sausage?

A I was thinking of smoked sausage.

Q And in your experience, what is the amount of normal or natural shrink between the weight of the sausage after it is produced and the time that it is sold?

A On smoked sausage, it would be about 4 to 5 percent, and on fresh sausage about 2 percent.

Q In attempting to compute if there is any difference between the total weight of the product that is left after giving due credits that you have mentioned and allowing

for its natural shrink, can you tell us accurately in any one particular week from your product analysis sheets?

A No, you cannot tell it accurately in any one week on our product analysis reports. The reason for that is that the inventories in a number of cases are approximated. It [109] would be too big a job to actually weight your inventory each Saturday because these departments are operating, some finish early, some finish late, some won't work at all, so other than our fiscal closing inventory, when we have the auditors come in, the inventories are to a large extent approximated.

Q Is will inventory more accurately at the end of the month than weekly inventory.

MR. PICKREL: We object.

THE COURT: I will overrule the objection.

MR. PICKREL: Exception.

MR. GOLDMAN: What is your answer?

A Getting back to the original question, are the figures accurate, of course, you are going to get a more accurate picture the greater number of weeks you take into consideration, because that is a plant there that is operating at 24 hours a day. I have stated that a big part of the inventories are approximate weights due to the nature of the business. You have to close down to get an exact inventory. Also, it is possible somebody might take an inventory in the sales department, take some of that product and ship it out, you could have a duplication there. But this duplication in one week would be offset the following week. For instance, if that inventory – you use the same each week – your closing inventory is the opening inventory for the [110] following week. As I mentioned, any sales, if they don't go through one week, they go through the following week. Taking an accumulation of a number of weeks, you get a very accurate picture.

Q In other words, if there are any errors in approximation of an inventory each week will get washed out over a period of time?

A That is right, because you are using the same inventory to start your operations as what you end your operations with. In other words, take a month operation, take the inventory the first week, second, third and fourth, if you were figuring that month and totalled these two inventories in here, and the middle wouldn't mean a thing, because you wouldn't use them. You take the total production for the month, your sales for the month and these interim inventories would have no effect whatever upon your final result.

* * *

CROSS EXAMINATION

161 Q You say all the pieces that go through the cutting room shrink 1/4 of 1 percent as the result of all these operations that you detailed, is that right?

A Yes, that's right. I said approximately a quarter of 1 percent. It might be a little less one day and maybe a little higher one day.

Q Do you have any ratio of quarter of 1 percent to a half percent?

A I think if I was taking the average, I would say about a quarter of 1 percent.

Q You think it would be about a quarter?

A Yes, sir.

Q And that quarter of 1 percent would be what you call cutting shrink?

A That quarter of 1 percent we don't call anything. I would just like to go back a little bit to bring out how this comes up. When we weigh our hogs, they go over [illegible] a scale we deduct 1 percent. That 1 percent takes care of the

initial cooler shrink, the cutting shrink and all subsequent shrinkages.

Q. Well, that may be, but you just told us a while ago that those figures on the white sheet included a 3 percent shrink, and they had not been cut up at all.

A. You asked me about those figures on that sheet so many different times. We take the original weight. We weigh just before it goes into the cooler. We accumulate those weights from the tape which comes off the scale. From that we deduct 3 percent. That 3 percent takes care of the cooler shrink, the cutting shrink, and is more than adequate to take care of any additional shrink.

Q. You think 3 percent covers the hog from the beginning clear through until it is sold?

A. Yes.

* * *

[164] A. That claim is -- the heading on that column says it was carcass weight processed. That carcass weight that is processed through the killing, from which many hogs were sold as hog carcasses. Therefore, 31 percent of that weight would not be fresh pork that was sold. There is many hogs that were sold in the dressed carcass form, or many carcasses of hogs sold.

Q. Sold as fresh pork.

* * *

[188] MR. GOLDMAN: May I again suggest these be admitted in evidence now. The admission was reserved on Exhibits 2 and 4. I assume there is no objection to admitting them in evidence.

THE COURT: They may be admitted.

MR. GOLDMAN: That is, 2 and 4.

THE COURT: They are admitted.

Thereupon the exhibits previously marked for identification Plaintiff's Exhibits 2 and 4, respectively, were admitted in evidence as **Plaintiff's Exhibits 2 and 4.**

* * *

199 Q In other words, if the foreman and the clerk made a mistake on July 4th, they would not make any mistake on July 11th, would they?

A If they forgot the whole inventory July 11th, on the basis of the claim, it would not make any difference, because on the week July 2nd, on the following week, July 8th, you would start out with the same inventory of the prior week, which would be July 11th, and one would cancel the other out. And as far as the claim is concerned the intervening inventories have no effect upon it, whether they [200] were accurate or inaccurate, because this claim is prepared on a cumulative basis.

Q So that your foreman and your clerk, if they made a mistake on one inventory, they never make it on another, is that your argument?

A No, I didn't say that. As far as the coordinate concerned, one would adjust itself.

Q All right. Now, the second period starts with your October inventory, that is, it starts November 5, 1949 and ends September 30, 1950. So in that period you had no actual inventory by count, did you?

A The two inventories involved were approximate inventories.

Q What two inventories?

A The opening and the closing would be the only inventories that would affect those figures.

Q And all in between were approximate?

A But they would have no affect upon the figures.

Q Well, that is what you say. But they were all approximate inventories. In other words, the man in charge -- you had a foreman in charge of your smoked ham department.

A What I am trying to point out, although one of those inventories, or the inventory might be approximated, [20] an error or misapproximation in one week will offset itself the following week. So the only two inventories that would be involved would be the one at the beginning period and the other at the end of the period.

[204] Q At or about that time, shortly thereafter you were informed that apparently there was a good bit of stealing or pilfering around the plant. Nothing particular, just informed of it generally.

A That's right. In a discussion of the business there that point was brought up on several occasions.

Q And you heard about it from time to time thereafter.

A Yes, sir.

Q I believe a man by the name of Arthur Beerman is president of your company.

A Yes, sir.

Q Did you ever hear of him sleeping out there at night trying to catch these burglars?

A Yes, sir.

Q Did you ever sleep out there at night, trying to catch the burglars?

A I have spent a lot of night hours there, but I never stayed there through the entire night. He came there very odd hours.

[205] Q In other words, while you were there catching burglars you did not sleep there, but you did spend

MR. GOLDMAN: Technical distinction. It is not claimed they were burglars.

[209] Q. You heard Mr. Beerman say he was being stolen blind, didn't you? Wasn't that a favorite expression of his, "They are stealing us blind"? Did you ever hear him say that?

A. I have heard words to that effect, whether those were the exact words, I don't know.

Q. And Willie Harris was a boy that was doing it, wasn't he?

MR. GOLDMAN: I object.

THE COURT: Sustain the objection.

Q. Do you know of anybody else that was doing it beside Willie?

A. Yes, I know there was other people, those [210] confessions, and I know from time to time we have caught various individuals taking a ham and so forth, and we would immediately fire them and make them known, for what reason they were being fired.

Q. You got that record?

A. Beg your pardon?

Q. Do you have that record?

A. No.

Q. You don't?

No.

Q. You don't have any record there of anybody caught stealing a ham or anything else?

A. I imagine our employment record would be marked by personnel, the employee was fired for stealing, whatever the cause might be.

Q. You didn't catch anybody yourself?

A. No, I never did catch anyone.

Q. Ever talk to anybody that was charged with stealing?

A I would say more than likely I did.

Q Do dou remember? I am not asking you to guess.

A They catch a man and he is fired for stealing and he works in the plant, I think at some time or other. I probably said "good morning" to everybody there.

[211] Q You know that ain't what I am talking about. Anybody caught stealing any of your pork products, did you ever talk with him when he was charged with that theft?

A No, regarding the theft, I don't believe we did. We usually turned them over to the person in charge. Some occasions they called the detective agency out for further questioning and trying to determine the extent.

Q You were trying all the time to find the various ways they were getting stuff out of that plant. You put bars on the windows. You changed the doors. You changed the locks. You changed the fence. You hired more guards. But you don't remember ever talking to anyone about how he stole something out of that plant, is that right?

A No, I did not specifically talk to them.

Q All right. But there was a lot of it going on, you say in your opinion. You don't know, but that's your opinion?

A That is correct.

. . .

[223] Q In other words, the records were kept approximately the amount that went into cure of each of these various articles?

A No, the amount is accurate. A vat holds a certain amount and they fill up that vat and that is it.

Q When you say there were 1600 pounds of bacon, that is an approximate figure?

[224] A It could be 1595 or 1605, something like that.

Q. It couldn't be 1625 or 1585, or might it be? Or do you know?

A. It will be very close, and they will come out to the average of that weight.

• • •

[232] Thereupon said document containing supporting data for the product analysis sheet for the week ending December 17, 1949 was admitted in evidence as **Plaintiff's Exhibit No. 3.**

• • •

[245] Q. And if these figures on your weekly sheets are inaccurate, either because hams were moved in round figure weight, or inventories were taken in bracket weights, which was not exact, and if your weekly sheets, therefore, are inaccurate, then that inaccuracy would carry forward into the claim filed by the accountant?

A. In the inaccuracies on the inventory would have no affect on the total.

Q. I am no accountant, but if your inventory is high, you said a while ago—you said if your inventory was $500 higher your loss would be $100 less.

A. Yes.

[246] Q. So, inventories do have something to do with your losses and gains?

A. No, not on a cumulative basis, because, as I said before, if it was understated one week, it would be understated the following week and they would pick up that amount either through sales and reinventory and one error would offset the other and it would have no affect on the total figure.

Q I can't follow you.

A No. You are using the same figure. One week it is treated as a credit and the next week as a debit.

Q But those weeks end. I know you start with the same thing you left off with the previous week, and then you have another ending.

A Yes.

Q Now, that ending is incorrect, and it is carried onto this weekly sheet that you have in your hand, which I have taken from Plaintiff's Exhibit 2, dated December 17, 1949. All right. Now, it is from those weekly sheets which show underage and overage that your accountant has computed the bill that he has presented to the defendant and I think you said that is right.

MR. GOLDMAN: I think, your Honor, that is a mistake. The accountant has presented no bill to the defendant.

247 MR. PICKREL: Don't get technical.

MR. GOLDMAN: The accountant has prepared a statement on which the plaintiff has made a claim.

Q The accountant made the statement on which your counsel has filed a law suit. The accountant's statement is based on the figures on this weekly report, one of which you have in your hand, is that right?

A That's right.

Q And it – catch the – if I wouldn't accuse you here of making a mistake. But if the inventory is correct or is approximate or is average – that would then affect one year or the other, your shrink or gain in the column on that weekly statement.

A You start with the – it would affect for that particular week. It would have no effect on the claim. If this was left out entirely, the inventories were left out entirely, the claim would be no different than what it is now, be-

the product would be there, so there would be tremendous gains. So you take the two weeks together and one offsets the other and it has no basis in the accumulation of figures as far as the weekly inventory.

Q. Then you think the fact that the hams are considered in weight, on a classification basis of anywhere from 6 to 30 pounds and the bacon anywhere from 6 to 20 pounds that has no significance at all?

A. No.

Q. None at all?

A. No.

Q. And the mere fact that they went into cure in round figures, so many, that has no significance?

A. No, no particular significance.

Q. No particular significance.

A. The vat might weigh 1395 one time, 1405 next time. It has no particular significance.

• • •

[259] Q. Those mistakes could be caused by inventory errors?

A. Yes, which washed themselves out. Or possibly sale going through in a wrong week, as I think I [260] stated before, when the inventory is taken, operation still going on, and some particular time a person might ship out some product which has already been inventoried, and there would be a double credit to this department, and that would offset itself the next week, because the sale went through the wrong week would affect the weekly results. But inasmuch as it was included in the period there would no effect on the 1947 or 1948 period results.

• • •

[264] Q. Now, I hand you one of my calculations just to save you the trouble. All you have to do is add it. The fresh pork sold during the first period was 3,970,944 pounds?

A. Yes.

Q The smoked pork sold was 2,683,782 pounds.

A Yes.

Q And the sausage sold, total sausage was 2,237,842 pounds.

A Yes.

Q Now, will you add those and see if my addition is correct there?

A (witness does as requested by counsel) Yes, your addition is correct.

Q Now you deduct that total amount –

THE COURT Excuse me. Were you using the word "sold" or "stole"?

[265] MR. PICKREL. Sold.

Q Now, deducting that total amount for those three items and the total amount is for those three items 8,892,624 pounds, is that correct?

A That is correct.

Q Now, we deduct that from the first figure of 9,758,443, which is the fresh pork total?

A Yes.

Q And what is the difference?

MR. GOLDMAN I object, your Honor. It is completely immaterial, has no bearing on the matter at all. They are not related items.

MR. PICKREL. We will see.

THE COURT I think he should have an opportunity to explore it.

Q How much is unaccounted for?

A I have just been studying your figures. I don't know why you are picking up these figures. You start out with a pork figure and then you talk about an item which also has beef in it. Sausage also has beef in it.

Q I don't know what you got in the sausage. I am giving you full credit for all the dollars you had in the

dressage [illegible] it had the kitchen sink in it. How much is unaccounted for between what we are charged with and what we are credited with, how many hundreds of thousands of dollars?

266 A. I can't answer that question from these figures because everything you were charged with you were credited with. You are trying to add apples and oranges here.

Q. No. I am adding no apples and oranges in this. These are all dollars.

A. As shown here are all dollars, but you are picking out a figure trying to draw a conclusion that is not correct.

Q. Let's argue about that later. Let's get the figures first.

A. The figures that you have on your sheet here show [illegible] but I said before that don't seem to mean anything.

Q. To you they don't mean a thing. Your charge is [illegible] 7,000,000 dollars.

A. I don't believe you are correctly stating the question. [illegible] if you were to examine those sheets, you would find that the pork department is credited with everything from those records. Everything can be reconciled except [illegible] disappeared, and I am not going to ask you to take [illegible] or ask me to make a conclusion of them.

. . .

REDIRECT EXAMINATION OF KENNETH SMITH

. . .

Q. Where is the disposition of the extra 9,758,11[illegible] pounds of carcass weight processed fresh pork shown [illegible] is shown on there?

A. The disposition of that weight is shown on our pro[illegible] Cutlets report for a product we were able to account [illegible] some shrinkages we cannot account for.

Q. Do you know of any explanation for the [illegible] that cannot be accounted for —

MR. SELVA: We object.

Q. Continued — ascribable to conduct in the course of business.

MR. SELVA: We object, if the Court please.

THE COURT: Sustain the objection.

MR. GOLDMAN: Have to proffer an answer, if your Honor please.

Out of the hearing of the jury.

The answer proffered is "no."

In the hearing of the jury.

Q. Mr. Smith, this reference to the smoked pork item total of 2,083,782 pounds, shown on the same sheet which we have been talking about as sales, will you describe there that smoked pork came from?

A. Smoked pork would be transferred from the curing department.

Q. And prior to that, where did it come from?

A. From the hogs which we cut.

Q. And is the amount which is transferred to the curing department shown on the product analysis sheets?

A. Yes, that is shown as a credit to the fresh pork.

Q. Is there any portion of the sausage item shown on the same sheets—

MR. SELVA: We object, if the Court please. The exhibits speak for themselves. That was Mr. Gould's reason.

MR. GOLDMAN: I haven't finished the question, your Honor.

THE COURT: I will overrule the objection.

Q. —continued — which originates from fresh pork?

MR. SELVA: Now we will object. The exhibits speak for themselves.

MR. GOLDMAN: Mr. Pickrel asked him what became of various things and I am attempting to bring out from the witness where those things are shown.

THE COURT: I will overrule the objection.

THE WITNESS: I have forgotten the question now.

(Thereupon the last Q. was read by the reporter.)

A. Yes, part of the items shown on the sheet originate from fresh pork and also part of them are beef and other –

Q. As to the portion which originates from fresh pork is that also shown on the product analysis sheets?

A. Yes, that is shown on the product analysis sheets as a credit to the hog which was cut up.

Q. Is the amount that comes from the fresh pork to [illegible] lard, which you mentioned, shown on the product analysis sheets?

A. Yes, sir, it is.

Q. Is the amount that comes from fresh pork to tankage shown on the product analysis sheets?

A. Yes. In that case there are two parts, those on the cleaning, parts that come off on the killing floor, there is a money credit, and anything comes off after the carcass is cut.

Q. The carcass weight processed pounds is 9,798,143. Is the portion that goes into tankage shown on the product analysis sheets?

A. Yes, sir, it is.

Q. Is the same thing true with respect to these various items as to the 17,069,507 pounds shown for the period ending 1950?

A. Yes, sir.

Testimony of Julian A. Hawk

DIRECT EXAMINATION

[283] Q Will you please state your full name?

A Julian A Hawk

Q What is your address, Mr Hawk?

A My business address?

Q Yes, sir.

[284] A 1127 Third National Building, Dayton, Ohio

Q What is your business?

A Certified Public Accountant

Q How long have you been a certified public accountant?

A Since 1928

Q You have been actively engaged in the business of public accounting since that time?

A Yes, sir.

Q With what firm are you connected?

A Arnold, Hawk & Cuthbertson.

Q Are you a partner in that firm?

A I am

Q In your practice of the profession of public accounting, have you had occasion to audit and do accounting for firms in and around Dayton?

A Yes, sir.

Q In that period of time you have been engaged in that profession?

A Yes, sir

Q I will ask you if your firm are auditors for the Sucher Packing Company?

A We are.

Q How long have you been auditors for the Sucher Packing Company?

[285] A Since 1948

MR. GOLDMAN: Mark this please. Plaintiff's Exhibit

Thereupon a document was marked for identification as **Plaintiff's Exhibit No. 6.**

Q. Mr. Hawk, I hand you a document which has been marked for identification as Plaintiff's Exhibit 6, and ask you if the original of this document was prepared under your supervision and direction?

A. Yes, sir.

Q. What is that document?

A. A computation titled "Computation of excess shrinkage and resulting unexplained loss, Stuchei Packing Company."

Q. Now, I hand you a group of documents which has been identified previously as the product analysis sheets of the Stuchei Packing Company for the 17 weeks period ending October 22, 1949 and for a 45 week period ending September 9, 1950, and I will ask you — and these documents have been previously identified as Plaintiff's Exhibits 2 and 3. I will ask you if there is any relation between the documents in my hand, these product analysis sheets, and the document in your hand?

A. This is a summary prepared from those product analysis sheets.

286 MR. GOLDMAN: Like to offer it in evidence, your Honor.

THE COURT: It may be admitted.

Thereupon said computation was admitted in evidence as **Plaintiff's Exhibit No. 6.**

. . .

THE COURT: I am inclined to believe that no person who did prepare it. Mr. Hadley [illegible]

[illegible] should identify and testify to it. I will sustain the objection of the defense to the introduction.

[illegible]

297 Q. Mr. Hawk, this question I am about to ask you has reference to general accounting principles. If you assume a situation, Mr. Hawk, where you take a series of inventories and series of records of the disposition of a 298 product, not confining it to this case, but in general, week after week, and the opening inventory of one week the same figures are used for the closing inventories of the preceding week, does it make any difference, is any error introduced insofar as errors in inventories may creep in with respect to any of the intermediate inventories other than the beginning and ending inventory of the entire period?

MR. SELVA. We object.

THE COURT. Overrule the objection.

A. I think it would not make any difference inasmuch as those errors would be counter-balancing if they exist.

Q. If, for example, in one week the inventory was so grossly misstated it would be eliminated entirely, and that was an intermediate week, would that introduce an error to the matter on the assumption that each week began with the closing inventory of the preceding week?

MR. SELVA. We object.

THE COURT. Overrule the objection.

A. No, it would not make any difference because—and at the next week with no inventory and any error in that one would be offset by the error in the next one.

Q. Now, Mr. Hawk, assuming again as a general case, not this specific case, but a general case, where one is attempting to determine whether or not there is an 299 inventory, whether there is anything missing, if a flow

of product in the neighborhood of between nine and ten million pounds goes through the hypothetical plant over an extended period of time, and assume that there could be some error in the opening and closing inventories, that is the first inventory of the period and the last inventory of the period, and assume that those inventories are in the neighborhood of — somewhere between 30 to 45 thousand, in that vicinity, would the errors, possible errors, in the opening and closing inventories materially affect the computation of what product is missing?

MR. SELVA: Object.

THE COURT: I take it you would assume in there that also all the intervening inventories were correct?

MR. GOLDMAN: No, your Honor. The assumption there is, the first statement has been that no errors in intervening inventories would make any difference.

Q. Now, assuming the opening and closing inventories have been washed out, assuming there would be possible error in those and assuming that the flow of product in the long period of time is in the neighborhood of nine million pounds as compared with opening and closing inventories in the neighborhood of 30 to 45 thousand pounds.

THE COURT: Just a minute. I don't know, Mr. Hawk, I would think you would not be able to answer that [300] question unless you knew that all or a substantial number of the intervening inventories were correct, would you?

THE WITNESS: I have testified, I think, all the intervening would be counter-balancing error.

THE COURT: You were asked questions about intervening errors in inventory. Now, you are asked about an opening inventory being inaccurate and a closing in

ventory being inaccurate. I don't know whether you stated the period of time.

MR. GOLDMAN: I say, take an extended period of time of 45 to 47 weeks.

THE COURT: Now, can you answer that question without knowing something about whether or not the 43 or 44 intervening inventories were correct?

MR. SELVA: We wish to object to the question. I don't know whether the record shows it.

THE WITNESS: I think I could answer that.

THE COURT: All right. Overrule the objection.

A. Inasmuch as the intervening inventories would be counter-balancing the beginning and ending inventories, only would affect the total result of the entire period. The relation in the opening and closing inventories would be rather small to the total pounds involved in your illustration, so that any error would have to be a very small percentage of the total, it would seem to me.

[391] Q. Did I understand you to say that the error —

THE COURT: Don't repeat the answer.

MR. GOLDMAN: The answer isn't quite clear to me. I heard the words but the meaning is not quite clear.

THE COURT: Let him state. Don't summarize it.

Q. I will ask you the question this way: Do possible errors in the opening and closing inventory, in the hypothetical case, have any material effect on the determination of the computation of the total missing product during that period?

MR. SELVA: We object.

THE COURT: Overrule the objection.

A. I don't think it would have any effect on the computations of the intervening periods. It would only have effect on the first period and the last period.

Q. And based on the volume of product during the — in the proportions I have stated, in your opinion, would the possible errors in open and closing inventories materially affect the results?

MR. SELVA: We object.

THE COURT: I think if you will read back the answer to the question before —

(Thereupon the A. before the last A. was read by the reporter.)

MR. GOLDMAN: I will withdraw my last question.

[302] Q. I gave you an example where the flow of product during the intervening period was in the neighborhood of 9 million pounds. If you will assume a case where the flow of product is in the neighborhood of 17 million pounds, what would your answer be with respect to the effect of possible errors in the opening and closing inventories on the total result?

MR. SELVA: We object.

THE COURT: I will overrule the objection.

A. It would seem to be smaller. It would have to be a smaller percentage on that difference.

Q. If, in computing the distribution of product to proper charges and credits, in the amount you have to start with, are also involved sales and there is possibly sales being charged into a different week from the time they are actually made, and if there is a possibility of having the opening and closing inventories not being exact, over how many — what period of time would be required approximately to have those errors either washed out or become insignificant?

MR. SELVA: To which we object.

THE COURT: Overruled.

A. Well, it would depend upon the size errors, of course, but ordinarily it would seem to me over a period

8, 10, or 12 weeks they would probably balance out pretty [303] well.

* * *

Q. Mr. Hawk, are you familiar with the manner in which the Sucher Packing Company has its controls set up?

A. Yes, in a rather general way.

Q. Are you familiar with the manner in which the product analysis sheets are made up?

MR. SELVA: We object, if the Court please.

[304] THE COURT: Overrule the objection.

A. Yes, again in a rather general way.

Q. You have seen, I believe that you said you have seen the product analysis sheets?

A. I have.

Q. In your opinion, based on your experience as an accountant, do you consider that the manner in which the product analysis sheets are set up is a good form or not good, whatever it might be, form of control to keep track of product?

MR. SELVA: Object.

THE COURT: Sustain the objection. I think the witness rather disqualifies himself. He said "in a general way."

MR. GOLDMAN: He says he is familiar with the sheets; he has seen them.

THE COURT: I think he ought to know more about it than in just a general way.

MR. GOLDMAN: I will put it in a hypothetical form then, your Honor.

Q. If you assume, Mr. Hawk, in the product analysis sheet there is an allowance made to start with for natural shrinkage while the product is in the plant, assume that the sheet provided a place to set forth the amount of the —

take for example a dressed hog – that the sheet [305] provides for the showing of transfers to other departments in the plant, such as sausage department, lard department, curing department, the inedible department, or any other transfer that may be made, and assume further that the sheet provides for the showing of sales made and further that the sheet provides for the showing of the opening and closing inventories, in your opinion, as an experienced accountant of many years, does such a system provide a good control or other than good, whatever your opinion may be, for keeping track of the product?

MR. SELVA: I will object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: I believe that is based on testimony so far, your Honor, I am asking his opinion as an expert whether that is a good system of control.

THE COURT: Well –

(Out of the hearing of the jury.)

MR. GOLDMAN: Note an exception. The answer would be "I consider it to be a very good system of control."

* * *

Testimony of Kenneth Smith

REDIRECT EXAMINATION—(Continued)

[310] Q. Now, of what does so-called cutting shrink consist?

A. The cutting shrink, as I interpret it, is that product you lose during the process of cutting. The only thing you lose would be bone dust, what weight you don't get back when you saw through a bone, or you permit a piece of meat, a little piece of meat, to stick on the knife that could not be salvaged. That is what I consider would be cutting shrink.

Q. If you are processing 400 hogs a day and if the hog weigh – what is the average weight of a hog?

A. Dressed hog may be 160 pounds on the average.

Q Actual experience 160 pounds on the average. [311] ou would have a total of 64,000 pounds of hogs cut a ay, in that 400 a day, is that about right?

A Yes, sir.

Q A quarter of 1 percent of that would be 160 pounds?

A Yes.

Q So that you are allowing 160 pounds in allowing a quarter percent cutting shrinkage for items of bone dust nd pieces that might stick to the knife and things of that sort?

MR. SELVA: We object to Mr. Goldman's statement, nless we have a right to cross-examine him.

THE COURT: I will sustain the objection. Your statement presupposes that he had previously testified to hat, which I think he did.

• • •

[313] Q Mr. Smith, when it appeared from a weekly roduct analysis sheet that excessive shrink appeared on hat sheet, was anything done by the management of the Sucher Packing Company with respect thereto?

[314] MR. SELVA: We object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: What is the ground?

THE COURT: Well, the testimony that would be roper is what was done in any of those instances. The itness testified that he did not know.

MR. GOLDMAN: Certain particular ones he did not remember as such.

THE COURT: What practice. I don't think is competent.

MR. GOLDMAN: All right, I will reframe it further.

Q What was done by the Sucher Packing Company hen excessive shrinks were noted on weekly product-an lysis sheets?

MR. SELVA: We object, if the Court please.

THE COURT: I am sustaining the objection not based on any technical matter that I think rephrasing the question will help. It goes to the very heart of the matter that certain specific instances brought out here the witness did not know what was done in those cases. And you either asked his practice or what was done. I don't think he can answer.

MR. GOLDMAN: I think the point is, he would not remember them by their particular date.

[315] THE COURT: I don't think if he knew what was done in any specific case, he wouldn't know what was done —.

Q. Mr. Smith, let me ask it you know if anything was done at any time that an excess shrink was noted on the weekly product analysis sheets?

MR. SELVA: We wish to apologize for continually objecting. But I must object to this question.

THE COURT: As I have stated, I am not sustaining the objection on the basis of any mere technicality as to how the question is phrased. I think it goes to the heart of it. If you wish to make a proffer of the answer, you may do so.

(Out of the hearing of the jury.)

MR. GOLDMAN: The witness if permitted to answer, would say "Yes, I do know".

(In the hearing of the jury.)

Q. What was done in a case that you do remember?

MR. SELVA: Object.

THE COURT: I will sustain the objection.

(Out of the hearing of the jury.)

MR. GOLDMAN: The witness if permitted to answer would say that the management checked over all the fig

...es, would keep employees on Saturday and check sales ...d purchases figures, make actual inventories of portions ...the plant

• • •

[317] Q. Mr. Smith, there has been some testimony ...to meat products being taken away in barrels. What ...the weight of meat in a barrel with the assumption as ...stified the meat products were covered with refuse?

MR. SELVA: We object to that, if the Court please, as ...rely speculative, assuming that some of it was covered ...th refuse to be taken out.

THE COURT: Well, I will overrule the objection. ...think he may testify as to the approximate weight of the ...arrel of meat. I suppose that may vary with different ...nds of meat.

Q. (Continued) Referring to the types of barrels that ...ere used to haul away refuse at Sucher's, how much would ...barrel of hams weigh?

A. Oh, hams, a barrel of hams would weigh — [318] ...ay some, maybe between 275 and 325 pounds, in round ...gures. We usually figure about 300 pounds to the bar...el.

Q. What would be the weight of 8 to 10 hams?

A. 8 to 10 hams would weigh, oh, a ham perhaps av...rage about 14 pounds, be a 140 pounds, if it is 10 hams.

Q. And what would 18 to 20 sides of bacon weigh?

A. Figure an average of about 12 pounds a side of bacon, ...0 sides would be 240 pounds.

• • •

Testimony of Abe Solomon

DIRECT EXAMINATION

[341] Q. I hand you, Mr. Solomon, a sheet which is part of Plaintiff's Exhibit 2, headed "Product analysis week ending 1/1/49." Referring to the second page of that, I will ask you if that is a sample of one of the product analysis sheets about which you have just testified?

A. Yes, sir.

* * *

[342] Q. Mr. Solomon, you are familiar with the sheets during the period involved in this controversy. Are they substantially the same?

A. Substantially, yes. The sheets show on one line live hogs. In each case the weight of the live hogs on opening inventory is shown in the first column from the left, and the weight of the live hogs purchased is shown in the second column.

Q. Under the heading "purchases"?

A. Under the heading of purchases.

* * *

[343] THE WITNESS: The next step in the processing of the live hogs was they are slaughtered, at which time the live weight is listed in the "Transfers out" as well as the money and the units, closing inventory, which when added to the kill, will equal the opening inventory and the purchases.

Now, this live weight is transferred to the fresh pork in a reduced figure, because the carcass of the hog does not weigh the same amount as the live hog, and the figures shown as a transfer into dressed pork, represents the weight of the dressed hog immediately after slaughter — the hog carcasses immediately after slaughter, less 3 percent. The

money value in the live hogs is likewise transferred out of the live hog category and it ends up in fresh pork, pork offal, hog casings, or inedible product, accounting for all the money.

At the time the fresh pork classifications move through the plant to ultimate disposition either through sales of the item as fresh pork, or through further processing and on these sheets in the fresh pork category, you will notice that first item, some purchases of fresh pork from outside sources. This is added to the opening inventory [344] of the fresh pork. Then there will be the transfers in, which represent the weight of the hog carcasses that will be the sales which represent that portion of the opening inventory and the purchases and the slaughter for the week, which was sold in the fresh pork state. And then there will be the transfers out which represent that portion of the fresh pork, whether it is opening inventory, purchases or slaughter, which is processed and sent to different departments through the plant, such as the curing department and sausage department, or inedible department.

The summary closes then with the closing inventory which when added to the transfers and the sales, should equal the opening inventory plus the purchases plus the slaughter.

Q. On these sheets after the column of closing inventory, there appears two further columns, shrink, gain and material profit. What are those?

A. The difference between the sales transfers and the closing inventory in one sum and the opening inventory plus the purchases, plus the slaughter, which is the charges represents the money, your profit or your loss. In pounds it represents your shrink or your gain.

Q. Now, you state with respect to cure, hams and smoked hams and sliced bacon – will you state whether

or not the same character of analysis is shown on these sheets.

[345] A Exactly the same.

Q Now Mr. Solomon, in this product analysis, I will ask you whether or not all distribution of meat product that can possibly be shown is shown.

MR. SELVA We object.

A Yes, sir.

MR. GOLDMAN Just a minute. When there is an objection you must wait until it is ruled on.

THE COURT I will sustain the objection. The answer may be stricken and the jury instructed to disregard it.

[346] Q Mr. Solomon, do you recall any occasions when there was a large shrinkage showing up on the product analysis sheets as to what was done about it?

MR. SELVA We object.

THE COURT I will overrule the objection.

A I know there were many instances —

THE COURT The question was —

thereupon the last Q was read by the reporter.

A Yes, I do.

[347] A Yes, I recall not one instance but many, many where we had an amount of shrinkage on smoked hams which was out of proportion.

THE COURT Well, what would you say?

THE WITNESS I don't remember specifically, your Honor. I don't remember the amount. I know, when I say it is out of proportion, it would have been in excess of two or three percent of the amount of the production for that week.

Q. What was done?

A. At that time we were preparing our product analysis records on Saturday afternoon, and the inventory was taken beginning at 11:00 o'clock on Saturday, and as the inventory came into the office it was computed and added for both weight and dollars. And on determining that there was this shrink on the smoked hams, we rechecked all our figures, our figures of production were re-added, we checked them out by re-adding the weights, checking the pieces insofar as we [348] could, and we actually went to the different portions of the plant where smoked hams were kept, and spot-checked the amount on the inventory. I recall one particular instance, this particular instance that we were baffled because we could find –

THE COURT: Not that you are baffled. What did you do?

A. (continued) We continued to check our figures and we re-added all the re-added all the figures that could possibly have any effect on the shrink.

MR. SELVY: We object to the conclusion of the witness. He can state what he did do, but I don't think his conclusion is proper.

THE COURT: Yes. What could possibly have had any effect is not proper. What did you do?

A. (Continued) We recounted the inventory and rechecked all our computations.

[349] Q. Do you have a recollection if there was or was not a practice with respect to what was done in the event a large shrinkage showed up?

A. Yes, sir.

MR. SELVY: We object.

THE COURT: I will overrule the objection.

Q. What was the practice, Mr. Solomon?

A. The practice was to recompute all the figures and to go back to the physical location of the inventory and if on occasion there had been some sales after the taking of the physical inventory, we would take these sales into account by adding them back to the inventory as we found them at the time we took it.

* * *

[352] Q. How long have you been doing auditing and accounting work?

A. 17 years.

Q. Based upon your experience in auditing and accounting, if you would assume that there may be some error — I don't say there is — but on the assumption there may be some error in the weekly inventories, in the two periods mentioned in this case, 47 weeks ending October 22, 1949, and as-reduced, 45 weeks ending September 9, 1950, would any possible error in any of the intermediate inventories make any difference whatever in the computation of the total unexplained loss?

A. They would make no difference whatever.

* * *

[353] Q. Why is that?

A. Because the intermediate inventories would cancel each other. The inventory that was overstated at the end of one period would be understated at the beginning of the following period since it was the same inventory.

Q. And as a matter of actual practice, was the closing inventory one week used at the opening inventory in the following week?

A. In every case.

Q. Now, also based on the relative total flow of product through the plant during the two 47-and 45-week periods

respectively, and the relation of that amount to the opening and closing inventories of the entire periods would – suppose now there might be an error in the opening and closing inventory, would those errors materially affect the result of the computation of the unexplained loss of product for the entire period?

MR. SELVA: Object.

THE COURT: I will overule the objection.

THE WITNESS: Could you repeat the question?

THE COURT: Read the question.

Thereupon the last Q. was read by the reporter.

A. No.

Q. Why is that, Mr. Solomon?

A. Because the total values and quantities of [354] the opening and closing inventories are very, very small fraction of the total product that is involved.

THE COURT: These answers presuppose now that all of the additions to the inventory during the period and the items taken out are correct; isn't that right?

THE WITNESS: Yes.

* * *

Q. Mr. Solomon, there has been some testimony that the employees at the Sucher Packing Company were given a bonus of one third of the profit before taxes.

MR. SELVA: Are we permitted to compare testimony? We object to the form of the question to commence with.

MR. GOLDMAN: I was saying that for the basis of the question, not asking for any comparison.

THE COURT: State your question.

Q. Did the company make any profit in the fiscal year ending October, 1949?

MR. SELVA: We object.

THE COURT: I will sustain the objection.

[355] MR. GOLDMAN: Without meaning any offense to the Court, may I ask whether any profit was made the year following?

THE COURT: You may ask the question.

Q. Was there any profit made for the fiscal year ending 1950?

MR. SELVA: We object.

THE COURT: Sustain the objection.

(Out of the hearing of the jury.)

MR. GOLDMAN: The witness, if permitted to answer would say "no".

(In the hearing of the jury.)

Q. Following the apprehension of the ring, September 1, 1950, did the company make any profit in the following year?

MR. SELVA: Object.

THE COURT: Sustain the objection.

MR. GOLDMAN: That is the last one I am going to ask him.

(Out of the hearing of the jury.)

MR. GOLDMAN: The answer is "yes".

* * *

[356] Q. Mr. Solomon, in the original claim made in this case, the sum of $162,365.34 was claimed and at the present time that claim has been reduced to $149,382.57. Do you have the computations showing the reduction and the reason and what the reduction is based on?

A. Yes, sir.

Q. Would you explain what the reduction comes to and what it consists of?

A. The total reduction is in the amount of $16,394.77. It is due to the elimination from the claim of [357] $9,620.90 on beef and veal.

MR. PICKREL: How much on each, please?

MR. GOLDMAN: They were combined.

MR. PICKREL: I am asking how much on each.

THE WITNESS: I don't have the breakdown with me. I am sure you have it on your desk.

Q. Would you be able to answer Mr. Pickrel's interjection by looking at Plaintiff's Exhibit 6?

A. Yes, sir.

Q. Which is not yet in evidence.

A. That figure was made up of $6,886.46 and that elimination was beef, and $2,734.45 was veal.

MR. PICKREL: May I check? You say beef is $6,886.00?

THE WITNESS: Yes, sir.

MR. PICKREL: What are you going to do about the $1,934.00 up above in the first period?

THE COURT: Suppose we let Mr. Goldman get through.

MR. PICKREL: I am sorry.

Q. What were the other eliminations? You have mentioned the beef and veal elimination.

A. From fresh pork we eliminated $3,591.67.

Q. What does that represent?

A. Which represented a proration of 15/18 [.358] which represented 3/18 or 1/6 of $27,997.04.

Q. Why was that subtracted?

A. The report provided by the Arnold, Hawk & Cuthbertson Company showed the 18 weeks ended September 30, 1950, and the 3/18 or 1/6 was eliminated to come up to the period of the claim which was through September 11, 1950 and a period of three weeks. This amounted to $1,749.81 and the amount deleted from fresh pork. The balance of $1,841.86 was an amount which was taken from the claim to account for meat that was placed in the employee — made available to employees in the cafeteria at lunch

hour which adds up to $3,591.57 eliminated from fresh pork.

Smoked pork we likewise eliminated 1/16 of an original $16,451.17 which represented the three weeks between September 11th and September 30th. On sausage, we –

MR. PICKREL: How much was that smoked pork that you took out?

THE WITNESS: $1,028.19.

MR. PICKREL: That is on account of the three weeks elimination?

THE WITNESS: Yes, sir.

MR. PICKREL: Your next was sausage.

A. (continued) – on sausage, we eliminated $234 from the claim on account of the three weeks, and $1,920 to allow for meat consumed in the employees' [359] cafeteria over the lunch hour. These reductions should add up or do add to $16,394.77, which brings the claim to $146,370.57.

* * *

CROSS EXAMINATION

[381] Q. And when you looked it over to determine this correctness, you did note "Note 1—fresh pork carcass weight is dressed weight after deducting 3% allowance for cooler shrinkage", didn't you?

A. Yes, sir.

Q. And when you looked it over, did you see anything on there that had anything to do with cutting shrink on this computation?

A. Yes. In looking it over, I took into consideration that the 3% that was listed on the bottom already taken into account plus the ½% which we show as normal shrink would be liberal enough to cover all the possible shrink

in the hog cooler, as well as cooler, cutting room, cutting shrinks and with some there to boot.

* * * *

[398] Q. Well, now, in 1950 were there any hogs sold as dressed hogs?

A. Yes.

Q. There were?

A. Yes.

Q. I think the testimony is that those are not included in here; isn't that right?

A. They certainly are included in there.

Q. They are included?

A. Yes.

Q. Then they go in part to make up this 9,000,000 pounds?

[399] A. Yes, sir.

Q. Do any of these people in this cutting room ever make a mistake?

A. Yes, sir.

Q. And do you have any margin for error that takes place in the cutting room, that occur in any business, that a person can overlook?

A. I think there are other people more qualified to answer that particular question than myself.

Q. You are treasurer of the company, aren't you?

A. That's right.

Q. You have said that mistakes do happen in the cutting room?

A. Yes, miscuts.

Q. As a matter of fact, they happen in any business, don't they?

A. Yes.

Q. And there is always a certain amount recognized in any businesses that margin of error, isn't there?

A. In this particular case, there would be no error. If a man cuts a thing wrong, he does not alter the total weight. If he takes off too much fat, that immediately goes into lard. The excess he takes off of ham would go [400] into lard. So, it would be a different type of error than something that would have to be thrown out.

* * *

[412] Q. Can you tell me what was done when there was an alleged shortage here of 11,616 pounds in April of 1950?

A. I don't recall what we did on that particular [413] date. But —

Q. Do you recall —

MR. GOLDMAN: Let him finish the answer.

MR. SELVA: All right. Go ahead.

A. (continued) — but the procedure I always followed from the time I came there in February was to thoroughly investigate the shortages by rechecking the figures, staying on Saturday, coming back on Sunday, and finished up on Monday, if necessary. Rechecking the figures, going back through all the details supplied by the people throughout the plant, and also checking physical inventories, checking sales analysis. All those things we did.

Q. You were looking for error, weren't you?

A. We were looking for error, yes.

Q. But you did not —

A. And whatever we found, we corrected.

Q. And you think you corrected all the errors?

A. We corrected all the errors we found.

Q. But you forgot about the food, to estimate the food of the parts of the hog that fell on the floor, didn't you?

A. The parts of the hog that fell on the floor in the hog

cutting room would be the parts that would be considered normal cutting shrink.

* * *

[414] Q. Now, you have on this chart that you must have observed as you looked at it, "average selling price dollars"; is that right?

A. That's right.

Q. Now, when you put average selling price, do you get those figures from a weekly price sheet put out by [415] packers to the retail trade?

A. No sir.

Q. You don't check that?

A. No sir.

Q. That is the price, however, that you sell the article for, isn't it?

A. That is right.

Q. All right, can you tell me whether or not those prices vary from week-to-week, let us say, fresh pork? Say with the first category for a while?

A. Yes, sir.

Q. How much would they vary from week to week?

A. On the averages, overall averages, from week-to-week, would probably, in normal years, not vary more than five or ten cents.

Q. Five or ten cents a week?

A. Five or ten cents a pound.

Q. That is per week?

A. You asked me whether the average selling price throughout a period, throughout the year, would vary, and I say it would vary some. Some weeks it would be higher and other weeks lower, depending on the cost of live animals and other factors.

Q. How did you get the average selling price?

We took our sales records and divided the [416] sales dollars by the number of pounds sold.

Q. Without any knowledge of whether more pounds were sold at the high or low figure?

A. That would make no difference in determining the average.

Q. All right. When you deducted these last three weeks that you speak of, weeks of September 16th, September 26th and September 30, I think it was, did you deduct the full weight from your claim or did you deduct an average again?

A. I deducted an average for the period. I took 1/16 loss and attributed it to those three weeks.

Q. You had the figures to deduct, actually, didn't you? Didn't you sir?

A. At one time we did have the figures. I didn't have them.

Q. When did you first decide to make that deduction?

A. We made it recently when Mr. Goldman pointed out to me that our claim was for a period in excess – past the point wherein the theft was discovered.

Q. And so, therefore, although you had coverage until November 1, 1950, you are not making a claim now for a loss, or alleged loss, of 11,096 pounds which occurred on September 16th, or an alleged loss of 3707 pounds which [417] occurred on September 25th, or an alleged loss of 6600 pounds which occurred on September 30th; is that correct?

A. We do not maintain that any of these losses were attributable to any particular week, and by that same token in eliminating these three weeks, we did that just to take our loss and cut it down so it would not be said that we are asking for – we have a claim in excess of the period. We feel that the

Q. I am not asking you what you felt. I am asking you what you did.

A. We took our loss for the period and in order to avoid any difficulty, we just took 1/16 of it and reduced it in order to come back to the weeks which could be stated were in the period on the claim. We made no claim for any week after September 11th, although perhaps we could have.

* * *

[418] Q. But you still had that loss going right along there after September 11th, didn't you?

A. We don't rule out the possibility of the loss having existed for –

Q. I didn't ask you whether you ruled out. I asked you if it is not a fact that you still had these shortages, September 16th, 11,000 pounds, September 25th 3700 pounds, September 30th 6600 pounds, after the date upon which Willie Harris was apprehended.

A. Those figures do not necessarily represent the shortages of those particular weeks.

Q. All right. They are there, aren't they, speaking of these three from Mr. Hadler's work sheet?

A. Yes –

Q. And on this work sheet you notice various weeks from November 5th all the way to September 30th of 1950, do you not?

A. That's right.

Q. I am speaking of November 5, 1949, and after each week you see an alleged shrink or an alleged gain, don't you, by week?

A. That's right.

Q. Not by total, but by week, do you not?

[419] A. Yes, sir.

Q. And still the net of each week does not gain a thing?

A. No, sir.

Q. All right.

A. We know that meat can gain weight and those gains do not mean that the meat – that the pigs had pigs, I guess. Neither do the shrinks necessarily mean in any one week that there was theft during that week.

Q. But in computing the excess alleged shrinkage and alleged resulting unexplained loss which appears – do you have your computation sheet, sir? – on the computation sheet that you now have?

A. I am sorry, I don't follow you.

Q. Let's withdraw it. In computing the figures contained on the computation prepared by Mr. Hadler, you will notice at the top of the left hand corner "computation for 47 weeks ending October 22, 1949", do you not?

A. Yes, I notice that.

Q. And in Mr. Hadler's tapes you find the gain or shrink represented on each one of these product analysis sheets for the period in question, is that right?

A. Yes, sir.

Q. And now you say that these mean nothing, is that right?

[120] A. I say that Arnold, Hawk & Cuthbertson were not told how to go about the business of determining the amount of this stuff. They could just as easily have taken the

Q. I didn't ask what they could have done.

A. They could just as easily, if they wanted to, determine the loss of 48 weeks. To start with opening inventory for 48 weeks and going to the transfers and purchases and subtracting out the sales and transfers, they would have come up with exactly the same result, and not becloud the issue by showing results of individual weeks.

Q. You think these weekly product analysis sheets be cloud the issue?

A. Inasfar as any single week by itself is concerned, they do.

Q. In this computation, Mr. Hadler, the CPA that you employed, only looked at the weekly product analysis sheets, transferred those figures on the tape and added those figures and came up from those figures that he took from this product analysis sheet with the exact amount that are appearing on this claim, didn't he?

A. Yes, but the sheet that he came up with here does not show any individual week. My contention is that the individual week by itself does not mean anything. That is why we took out the last three weeks. He would have come [421] up with the same result had he eliminated and used all the data on these sheets to eliminate the weekly variations.

Q. Now, Mr. Solomon, as treasurer of the company you have a closing on October 31st of each year, don't you?

A. That's right.

Q. Was there any reason for terminating the first 17 weeks of this period on October 22, 1949 instead of October 31, 1949?

A. Yes. The reason was that we could not find the figures for that particular week, the folder, because it was the end of the year, perhaps had gotten more attention than the rest of the folders and could not be found with the rest of them.

Q. So, without that analysis sheet, you were unable to include, or at least Mr. Hadler was unable to include any figure for the 18 weeks, so he stopped at 47 weeks, is that right?

A. I assume that is what he did. I say, again, I did not tell him how to do his job.

[438] Q. And all of these other figures, when you talk about normal shrink, excess shrink, unexplained loss, you use an arbitrary percentage to arrive at those figures, don't you?

A. We don't feel they are arbitrary.

Q. You don't feel they are arbitrary?

A. No.

Q. It is 3, isn't it, in the case of fresh pork cooler weight? I mean on the computation sheet.

A. In computing the loss on fresh pork, we started with a figure that was already 3 percent less than the hot weight and in order to be what we felt was conservative, we took an additional 1/2 percent as normal shrink. So, the computation 9,758,000 pounds we referred to above –

Q. That is the beginning.

A. (continued) – is already shrunk 3 percent.

* * *

[440] Q. Now, Mr. Solomon, I just want no explanation to begin with, please. Can you tell me the number of pounds of meat that was given to the cafeteria by the Sucher Packing Company for its employees during the second period which runs from November 5th to September 9th of – at this time?

[441] A. I can't, but only because I couldn't find the record.

Q. Another record you couldn't find, is that it?

A. Yes, sir.

Q. All right. So, how did you arrive at the credit which you are now allocating at the beginning of this trial as a credit on the loss? Just pick some figure out of the air, or just estimate it?

A. You mean the credit I was talking about this morning?

Q. I was talking about the credit Mr. Goldman gives to this cafeteria meat.

A. We arrived at that based on the number of pounds being consumed in the cafeteria today, and allowing for the fact that we now have in excess of 300 employees. We had 200 at that time. Subtracting it from the claim at an average cost, that would eliminate it from the claim and being very generous about the concession.

• • •

[461] Q. Mr. Solomon, continuing your interrogation, I hand you what is a transfer sheet for the week ending February 11, 1950, and ask you to examine it. The hams, the callies, the bellies, and tell me whether or not the transfers of those items into other departments are generally in round figures?

A. The figures are shown here all end in zeros or five, but that is customary.

Q. All right. So, those actually are approximate figures, are they not?

A. They are not to the exact pound. However, they are not wild guesses, either.

Q. I said they were approximate figures. By that I mean, where you have hams 10 to 12 transferred on Monday at 2810, it might be 2818 pounds, or 28 pounds, might [462] it not?

A. That is 5 or 10 pounds either way.

Q. Only 5 to 10 pounds variance in these figures.

A. Yes, sir.

[470] MR. GOLDMAN: Your Honor, I object. It has been testified a number of times that the intermediate inventory do not have any effect on the claim.

THE COURT: That is what you claim. I take it that

is probably a question for the jury to determine from the evidence.

MR. GOLDMAN: It is a mathematical fact, your Honor.

193 Q. As a matter of fact I was ordered not to interview Mr. McConkey, wasn't I?

A. Yes, sir.

Q. Sure.

A. Not to interview Mr. McConkey unless our company counsel was present.

Q. Well, he was in Cincinnati, wasn't he?

A. I think he was on that particular day, yes sir.

Q. He is there permanently, isn't he? Isn't that where his office is?

A. He is available to us, when we need him.

Q. Did you try to get him in that morning?

A. I think on that particular day his wife had a baby.

193 MR. GOLDMAN: Your honor, there isn't any doubt about the matter. I was not present and I requested Mr. Selva on the telephone not to go out there unless I was present, also, my wife had a baby on that day. I could have come up and he went out anyhow. On my instructions he was ordered to leave the premises until I could get out there.

197 Q. Give the week November 5th, 12th, 19th, 26th, December 3rd, 10th, 17th, 24th, 31st, January 7th, 14th, 21st, 28th, February 4th, 11th, 18th, 25th, March 3rd, 12th, 18th, 25th, April 2nd, 8th, 16th, 23rd, 30th, May 7th, 13th, 20th, 27th, June 3rd, 10th, 17th, 24th, July 1st, 9th, 16th, 23rd, 29th, August 5th, 12th, 19th, 26th, September 2nd, 9th, 16th, 25th, and 30th, why did you give him those

particular weeks and have him itemize them on that schedule?

A. I gave the firm of Arnold, Hawk & Cuthbertson all the information that they asked me for. I gave them no instructions as to which way to itemize the particular information. By omitting the interim inventories during this period, and using only the inventory beginning the week of November 5th and the inventory at the end of the week of September 30th, the firm of Arnold, Hawk & Cuthbertson could have come up with exactly the same results, completely ignoring all interim inventories.

The sheet that we give them contained all of the figures of production and sales and transfers, which when combined with the inventory at the beginning week of November 5th and the inventory at the ending week of November 30th would have come up with exactly the same [498] net results shown on this sheet, without showing any gain or loss in any one week.

Q. Assuming, of course, your basic figures were correct?

A. Yes, sir.

REDIRECT EXAMINATION

500 Q. Mr. Solomon, in answer to a question by Mr. [illegible] you stated that a certain photostat which has been previously identified as Defendant's Exhibit M, you stated that that was the only record of that kind that you had in Western Hardware Corporation. Will you please tell us the name of that record and what that type of record is?

A. [illegible]

pared at the time that a man is employed and carries the record of his employment, his increases and transfers throughout his employment at the plant. This record is only prepared for full time employees who are put on the payroll. Any day laborers would not have such a record. Normally, this record is kept for an employee for an unlimited period of time and if he should leave, because of reduction in force, or temporary layoff, or resign, and ever come back, the same card is used. In some instances, though, several [501] cards are prepared because the original card cannot be located in time to be used for the next payroll that a man should appear upon.

Q. Now, with respect to day laborers, is there any other sort of record that was kept?

A. Well, with respect to day laborers, there would be — the basis of their payments would be a time card which the superintendent and the foreman would have prepared and the payroll clerk would pay on the basis of that card, rather than on the basis of an hourly rate shown on an employment record.

Q. Have you maintained the employment record that far back of day laborers in a complete state?

A. No. We had a wages and hour investigation that carried through 1953 and at that time we disposed of quite a few records.

Q. That is after the investigation?

A. Yes. We disposed of the old time cards and records of that type.

Q. Now, however, were you able by search to find any time cards of day laborer for William Harris?

A. Yes. I found one card that in cleaning out our cabinet we missed one drawer, and I found a payroll there in early 1950 in which there was a card for William Harris.

which I identified as the William Harris on this employment [502] card by a social security number.

* * *

[510] Q. Now, in Plaintiff's Exhibit 6 for identification, there is an additional item in column of normal shrinkage of 1/2 percent for fresh pork. What was that for?

A. I think we can say that the 1/2 percent additional for fresh pork was thrown in for good measure, just to be on the safe side.

Q. At the time that the claim was prepared, Mr. Solomon, did you consult others besides your own staff with respect to the amount to use for computing normal shrink?

A. Yes. I consulted with the officers of the company and with packers that we were on friendly terms with. I remember writing to the American Meat Institute in Chicago, of which we were a member at that time.

Q. And did you receive a reply, do you know, from the American Meat Institute?

A. Yes, we did.

MR. GOLDMAN: Mark this for identification as Plaintiff's Exhibit 8.

Thereupon said document was marked for [511] identification as **Plaintiff's Exhibit No. 8.**

Q. I hand you, Mr. Solomon, what has been marked as Plaintiff's Exhibit 8, which purports to be a letter from the American Meat Institute dated November 16, 1950. I will ask you if that is the reply you received on the subject of normal shrinkage from the American Meat Institute?

A. Yes, sir.

MR. GOLDMAN: We offer it in evidence.

MR. SELVA: We object.

THE COURT: Sustain the objection.

MR. GOLDMAN: We will proffer it.

Q. I will ask you, Mr. Solomon, whether your company figured a shrinkage of 3 percent in its general accounting procedures both before and after the period of this claim?

A. Yes, sir.

MR. SELVA: Did you finish your question?

MR. GOLDMAN: Yes, sir.

MR. SELVA: Then I object.

THE COURT: I will sustain the objection for the reason that would not be proper redirect examination and that has been testified to.

. . .

[512] Q. Mr. Solomon, yesterday, or I should say last week, you referred to the product analysis sheet for the week of January 8, 1949, in which a computation was made in which it was shown that the inventory appearing on the sheet as a closing inventory of 81,853 pounds was in excess of the opening inventory, after adding the transfers in and transfers out in sales, and you stated, I believe, that the difference was reflected in what was recorded as a gain for that week. I will ask you to look at the product analysis sheet for the week ending January 8, 1949, and ask you if those 2697 pounds as shown on this sheet as a gain?

A. Yes, they are.

Q. What is your statement with respect to there being an actual gain as distinguished from a gain on paper?

A. Well, it is impossible for meat to gain weight. Certainly there could not have been that gain. That gain was the result of the — perhaps of the overstatement of the final inventory.

Q. Now, I hand you the product analysis sheet for the immediate following week, week ending January 15, 1949.

and ask you what that shows for the opening inventory for fresh pork?

A. Shows 81,853 pounds.

[513] Q. That is the same as shown for the closing inventory for the preceding week?

A. Correct.

Q. If the inventory for the preceding week was in error by being overstated, what effect would that have by being used in the following week?

A. It would cause a shrink in the following week.

Q. What is the reason for that?

A. Because the opening inventory being the amount charged in to be counted for that week, would be in excess of what could possibly be accounted for since it was not there. Therefore assuming that the inventory at the end of the second week is correct, that amount which could not be accounted for would appear as a shrink.

Q. What do you show on fresh pork as to shrink or gain the week — on the paper, at any rate, for the week ending January 15th, the week following the week which was tabulated here on the board?

A. Shrink of 1816 pounds.

Q. And if you were to assume, as has been indicated by the figures, that the opening inventory was overstated 2697 pounds, how would that affect the actual shrink?

A. It would make no difference at all in the [514] actual shrink because the only error would be the erroneous figure in the (interim.)

Q. What effect, however, would that have in computing the shrink from the figure which you read from the sheet?

A. It would reduce the shrink of the second week, or would reduce the shrink of the two weeks' period by the amount of 2697 pounds.

[515] Q. I hand you, Mr. Solomon, what has been

marked as Plaintiff's Exhibit 9, and ask you if that is a copy of the policy which involved in this case?

A. Yes.

MR. GOLDMAN: I would like to offer that in evidence, your Honor.

THE COURT: It may be admitted.

* * *

[519] Q. Mr. Solomon, after the employees were apprehended on September 11, 1950, what was done with respect to notifying the insurance company? That is, the defendant, Manufacturers Casualty Insurance Company, of the occurrence?

A. We immediately contacted the agent in Dayton of the Manufacturers Casualty Insurance Company, who was John L. Macbeth of the Manufacturers Casualty Insurance Company and notified him of the occurrence and we were particularly anxious at that time that —

THE COURT: Just a minute. Not what you were anxious about. What you did was the question.

A. (Continued) — we notified the agent and we asked him if our notifying him —

MR. SELVA: We object, if the Court please, to the conversation, if there was any.

THE COURT: Sustain the objection.

MR. GOLDMAN: Your Honor, the man is the agent for the company. He is the man who represented them in obtaining the policy. Under the terms of the Ohio Statute [520] I believe he is considered the agent of the company.

THE COURT: Well, he says he notified him.

MR. GOLDMAN: The answer in this case denies there was notice, your Honor.

THE COURT: You don't have to anticipate the defense.

MR. GOLDMAN: I suppose that is so.

Would you mark this for identification, please, as Plaintiff's Exhibit 10.

Thereupon said document was marked for identification as **Plaintiff's Exhibit No. 10.**

Q. I hand you a document which purports to be a letter from Mr. John L. Macbeth, — John L. Macbeth Company, dated September 18, 1950, identified as Plaintiff's Exhibit 10, and ask you if you received that letter?

A. Yes, sir.

Q. On or about the date thereon, September 18, 1950?

A. September 18, 1950.

MR. GOLDMAN: We offer that in evidence, your Honor.

MR. SELVA: Object.

THE COURT: Let's see it.

(Counsel hands letter to the Court.)

I will sustain the objection.

[521] MR. GOLDMAN: May I ask your Honor for the ground? It is anticipating the defense, is that your Honor's ruling?

THE COURT: Well, that, and it is a letter from the agent. I don't know whether he is acting within his authority or not.

MR. GOLDMAN: Under the Ohio Statute he is their agent. They cannot avoid his authority.

* * *

[523] Q. Mr. Solomon, did you subsequently send to the insurance company a proof of loss?

A. Yes.

MR. GOLDMAN: Mark this for identification please, as Exhibit 11 and 11-A.

Thereupon two documents were marked for identification as **Plaintiff's Exhibit Nos. 11 and 11-A.**

Q. Hand you, Mr. Solomon, what has been (524) identified as Plaintiff's Exhibit 11, and ask you what that is.

A. That is a copy of a registered transmittal letter sent to the Manufacturers Casualty Insurance Company, of Philadelphia, transmitting the itemized proof of loss, duly sworn to, under policy No. 69f99. The letter is dated January 7, 1951. I wrote it.

Q. I hand you what has been identified as Plaintiff's Exhibit 11-A, and ask you what that is.

A. That is a copy signed by me of the itemized proof of loss.

Q. Was that enclosed with Plaintiff's Exhibit 11 and transmitted to the Manufacturers Casualty Insurance Company?

A. Yes, sir.

Q. To the address stated on the letter?

A. Yes, sir.

* * *

530 Thereupon said copy of a letter was marked for identification as **Plaintiff's Exhibit No. 13.**

Q. I hand you Mr. Solomon what purports to be a copy of a letter from Mr. Green, of Pickrel Schaeffer & Ebeling, Dayton, dated January 15, 1951, and ask you if

the original of this letter was transmitted to Mr Green in the ordinary course of business?

A Yes.

* * * *

RECROSS EXAMINATION

541 Q But you did hire detectives that you know of?

A Yes.

Q And did you put on extra guards?

A Yes, sir.

Q And you did strengthen fences?

A Yes, sir.

Q And you did put up a closer check of in going and out going employees?

A Yes, sir.

Q And you knew acts were going on then which would give rise to a claim, didn't you?

A If we could find it.

Q You knew acts were going on?

A If we could find the individuals and catch them it could give rise to a claim.

Q That is your interpretation?

A Yes, sir.

Q But you never notified the Manufacturers Casualty Insurance Company of these substantial losses starting November 5th and going right on through, representing unexplained shrink, did you?

542 MR GOLDMAN Do you have reference to the Home office in Philadelphia? Are you restricting it to that?

MR SELVA I don't care whom he notified.

Q Did you notify the Manufacturers Casualty Insurance Company in Philadelphia?

A. No.

Q. Did you notify anybody of the Manufacturers Casualty Insurance Company of the loss arising the week ending November 5, 1949?

A. For that particular week?

Q. Yes. Sure. That is the week when the loss was sustained.

A. I don't remember.

Q. Would your answer be the same on each and every one of these weeks? Until September 11th?

A. No, sir.

Q. All right. Let's see which weeks you remember.

A. I don't Remember what week. Mr. Beerman contacted Mr. Macbeth to determine if our insurance covered this type of loss.

Q. But –

MR. SELVA: That is not in answer to my question. I asked him whether or not he made any report to anyone.

Q. Do you want to say now that you made a [543] report to Mr. Macbeth?

A. I talked to him about it, sure.

Q. You did? All right. When did you talk to him about any loss in this schedule?

A. I worked in Mr. Beerman's office from July, 1948 and from then until the time I went to Suchers. I remember being instructed to find out.

Q. I didn't ask you what you were instructed to do. I asked you to tell me when you talked to Mr. Macbeth.

A. I don't remember at this time the exact date.

Q. Don't you remember in July or August of 1954 that you never talked to him before September of 1950?

A. I am sure that I talked to him before September 1950.

• • •

[559] Q. And there could be a deviation up or down in the hams, picnics, bellies and the jowls?

A. In each vat a few pounds a vat.

Q. That affects the transfer-out of fresh pork?

A. Insofar as the net deviation that is true.

Q. You don't know what the net deviation would actually be, do you?

A. Well –

Q. They are all even figures here.

A. We know from experience that the net deviation would be very small, would be between 5 and 10 pounds a vat.

Q. Between 5 and 10 pounds a vat?

A. Roughly.

Q. All right, roughly. What would the deviation be in the week ending January 15, 1949, in hams?

A. I would say it would probably be zero, because there would be as many vats over 1400 pounds as there would be under 1400 pounds.

[564] MR. GOLDMAN: In view of the question asked Mr. Solomon concerning Mr. Macbeth's letter, I should like to re-offer the letter at this time, the letter of September 18th, as Plaintiff's Exhibit 10.

MR. SELVA: We object. It is not an exhibit yet.

THE COURT: Do you object?

MR. SELVA: Yes, sir.

THE COURT: I will adhere to the ruling heretofore made.

* * *

Testimony of Robert Hadeler

DIRECT EXAMINATION

[565] Q. State your name, please.

A Robert Hadeler

Q What is your address, Mr. Hadeler?

A 410 Wiltshire Blvd., Dayton, Ohio

Q And with what firm are you connected?

A Arnold, Hawk & Cuthbertson, Certified Public Accountants

Q For how long have you been in public accounting work?

A I have been with Arnold, Hawk & Cuthbertson since the beginning of 1948; and prior to the war I was in [566] public accounting for approximately four years.

Q Are you a certified public accountant?

A Yes, I am.

Q Mr. Hadeler, did you have any occasion to make any studies at the Sucher Packing Company in connection with product that was said to be missing?

A Yes, I did. Shall I elaborate?

Q Tell us what you did.

A Well, the company called us out and requested that we make a study of their records with a view to determining the extent of any unexplained losses, any inventory disappearances which we could determine from those records. We proceeded to make that study.

Q I hand you, Mr. Hadeler, what has been marked as Plaintiff's Exhibit 6 for identification, previously, and ask you what that is.

A Well, this is a schedule which we prepared based on the study which I have just referred to. It is entitled

Computation of Excess Shrinkage and Resulting Unexplained Loss".

Q. What records did you use to make that compilation?

A. Basically, we worked with sheets that the company keeps each week. They are called "Product Analysis Sheets".

[567] Q. Why did you use those sheets as the basis for your computation?

MR. SELVA: Object, if the Court please.

THE COURT: Sustain the objection.

Q. Are you familiar with the procedure set forth in the product analysis sheets of the company?

A. Yes, I am. We never made an exact audit of those sheets. However, we have from time to time reviewed the procedures followed at the company in preparing these product analysis sheets. We believe the procedures followed to be sound. If those procedures are properly followed, they will give a satisfactory answer and feel the result not showing any disappearances which could not be legitimately accounted for. –

MR. SELVA: Move the answer to be stricken because it is not responsive to the question.

THE COURT: It may be stricken.

Q. Will you state in your opinion, Mr. Hadeler, whether, based on your accounting experience, whether the product analysis sheets are or are not a sound procedure, if properly followed?

MR. SELVA: If the Court, please, we object to that.

THE COURT: Sustain the objection.

MR. GOLDMAN: (Out of the hearing of the jury.)

[568] Proffer the answer. Yes, they are sound.

Q. In your opinion, Mr. Hadeler, based on your experience as an accountant, will you state whether or not the product analysis sheet, if properly followed, reflect the disposition of products at the Sucher Packing Company?

MR. SELVA: We object to that, if the Court please.

THE COURT: Sustained.

MR. GOLDMAN: Your Honor, can't we show -- this man is an expert--his opinion as to the character and soundness of the method, not referring now to the accuracy of any particular figure, just to the method.

THE COURT: No I don't think it is a proper subject for expert testimony.

MR. GOLDMAN: (Out of the hearing of the jury) Proffer the answer and state that the witness, if permitted to answer, would say that in his opinion the procedures of the product analysis sheets, if properly followed, will show the complete disposition of the product.

(In the hearing of the jury) I would like, at this time, to offer the exhibit in evidence, your Honor, Plaintiff's Exhibit 6.

MR. SELVA: No objection.

Thereupon a document entitled "Computation of Excess Shrinkage and Resulting Unexplained Loss" was admitted in evidence as **Plaintiff's Exhibit 6.**

569 MR. GOLDMAN: For the purpose of convenience I would like to pass them among the jurors, so they will understand what I am questioning the witness about.

(Thereupon copies of Plaintiff's Exhibit 6 were passed to each of the jurors.)

Q. Mr. Hadeler, referring to Plaintiff's Exhibit 6, will you please explain the various headings and items in that exhibit.

A. Well, starting right up at the top, we have a fresh pork item and reading across the page, the carcass weight

processed in pounds, that is the total weight of dressed hog carcasses that were processed during the period of the 47 weeks ending October 22, 1949. Then, in the following two columns, we have the sales expressed as pounds, 3 million and some odd and 1 million dollars, and the average selling price in dollars is the average selling price of those pounds. And going on further, there is a column entitled "Weight Shrinkage in Pounds". That is a recap weight shrinkage, as shown on the product analysis sheets for each of these 47 weeks we are talking about as they relate to fresh pork.

Q. Ask you whether in that connection any gains shown on the product analysis sheets were subtracted from the shrinks?

A. Yes, in certain weeks because of certain [570] inaccuracies in the inventories, which have no overall effect on this. We have deducted any overages on the shrink.

MR. PICKREL: Owing to certain inaccuracies in the inventory?

THE WITNESS: In the intervening inventories, yes, sir.

Q. Now, with reference to the carcass weight processed in pounds, I noticed you have a note at the bottom of your sheet reading "Fresh Pork carcass weight as dressed weight after deducting 3 percent allowance for cooler shrinkage". What is that, please?

A. The practice at the Sucher Packing Company is to weigh the hogs carcass immediately after they are slaughtered. Of course, they are still warm at that time. There is a shrinkage in the industry. It is generally recognized a shrinkage from the hot weight until they are cooled and further processed and finally disposed of, and this 3 percent shrinkage has already been deducted when we arrive at the 199,000 weight shrinkage, which is shown.

Q. If I understand you then, is the 199,100 pounds of weight shrinkage, after the 3 percent is already deducted or before?

MR. SELVA: We object to the form of the question, summarization.

MR. GOLDMAN: I am asking him whether it was after [571] or before, so as to make it clear, your Honor.

THE COURT: Well, it is leading in form. Let him testify.

A. The 3 percent shrinkage has been deducted and this 199,000 is an additional shrink on top of the normal 3 percent shrinkage.

Q. And what is your next column?

A. The next column headed "Normal Shrinkage", and is explained in the footnote. Normal shrinkage is expressed as percentage of carcass weight processed in the case of fresh pork. Just a further shrinkage allowance that has been put into these figures.

Q. What is the column headed "Excess Shrinkage"?

A. Well, that is the shrinkage. That is really the 199,000 with the 48,000 taken away from it. It is the excess shrinkage as to the column—as the column says. It is the shrinkage from the normal shrinkage.

MR. SELVA: We object, if the Court please. The normal shrink hasn't been determined yet.

THE COURT: I will overrule the objection.

Q. What is the last column?

A. It is entitled "Unexplained Loss", and it represents the column headed "Excess Shrinkage" multiplied by the average selling price. It is the excess shrinkage expressed in terms of dollars, in other words.

[572] Q. Now, with respect to smoked pork and the sausage items that are on there, are the figures in their respective columns analogous with respect to them?

A Yes, sir. They are basically the same type of figures.

Q Now, then, below the middle of the page you have a heading "For 48 weeks ended September 30, 1950." Will you explain that, please?

A Well, it is intended to be comparable to the period given above. The figures are the same type of figures for a subsequent period to that shown above.

Q The figures you have under total for 47 weeks ended 9/22/49 just above the middle of the page in dollars.

A That line right on across equals the total for that period. The final figure are you referring to?

Q Yes.

A $104,183.82.

Q What does that cover?

A The column is entitled "Unexplained Loss." It represents a disappearance which we could not account for through the legitimate transactions that were recorded on these sheets.

MR. SELVA: We move the answer be stricken.

THE COURT: Sustain the motion.

Q Were you able to account for the amount ($73) called "excess shrinkage" from the figures that appear on the weekly product analysis sheets?

MR. SELVA: We object.

THE COURT: I will sustain the objection. I think it is just what he says it is. As far as they are concerned it is unexplained loss. All he was working with were the books.

MR. GOLDMAN: Correct, your Honor. As far as he was concerned there was no explanation given for it in the books.

THE COURT: As he said, it is unexplained loss obtained from the books.

MR. GOLDMAN: Mark these as Plaintiff's Exhibits 14 A and 14 B.

Thereupon a group of papers was marked as **Plaintiff's Exhibit 14-A** and **Plaintiff's Exhibit 14-B.**

Q. I hand you, Mr. Hadeler, a group of papers which have been marked as Plaintiff's Exhibit 14-A, and ask you what they are?

A. They are work sheets which we prepared in working up this Plaintiff's Exhibit 6.

Q. And which of the two periods do these work sheets cover?

A. These belong to the 48 week period in September 30, 1950, the period shown on the bottom of [574] Exhibit 6.

MR. GOLDMAN: Mark those adding machine tapes 14-C.

Thereupon said adding machine tapes were marked for identification as **Plaintiff's Exhibit 14-C.**

Q. I hand you a group of adding machine tapes, and ask you what they are? They have been marked as Plaintiff's Exhibit 14-C.

A. These are adding machine tapes which we ran to prove the totals on the sheets I am holding in my hand here.

Q. Exhibit 14-A, in which the figures are written in longhand?

A. We have tapes here listing this column, for instance, coming down with the total. I presume the rest of them are similar.

Q. Do you want to look at them and see?

A. (The witness does as suggested by counsel.)

Q. You have taken from the tapes a group of tapes, Mr. Hadeler, those which relate to the work sheets you have in your hand?

A. Yes, sir.

Q. Now, I hand you a group of papers which have been marked Plaintiff's Exhibit 14-B, and ask you what those are?

[575] A. These are our work sheets for the subsequent or prior period to this. In other words, for the period ended in 1950, we actually tabulated in longhand the numbers and then ran tapes on them. When we were working up the figures for the period before that, instead of writing them out in longhand, we put them directly on an adding machine tape and ran them directly on them. This represents our work sheets for the other period. For the period for the 47 weeks ended October 22, 1949.

Q. I notice, Mr. Hadeler, that under fresh pork weight shrinkage, the adding machine tape on Plaintiff's Exhibit 14-B, there are some pencil notations at the bottom. What does that indicate?

A. Well, in running that tape, we apparently made some errors and we are just correcting the errors we made in running the tape. Incidentally, we ran two tapes to make sure we were picking up the right figures and proved them out at the bottom. On this one tape, we made some errors that we had to correct, and finally the totals on each tape agreed and we have done that throughout.

Q. Were the totals, as corrected, the figure you entered in Plaintiff's Exhibit 6?

A. Yes. It is the weight shrinkage for fresh pork, 199,100 pounds.

Q. Now, the totals that appear with minus after [576] them in the column, what does that indicate?

A. In certain weeks, instead of having a weight shrinkage there might be a weight gain. Those would be shown here as a minus figure, and they are deducted from the overall total. The shrinkages are shown as plus figures and

the gains minus figures. So, we get down to a net shrinkage figure.

MR. GOLDMAN: I would like to offer in evidence Plaintiff's Exhibits 14-A, 14-B and 14-C, your Honor.

MR. SELVA: No objection, if the Court please.

THE COURT: They may be admitted.

MR. GOLDMAN: Thank you.

Thereupon said documents were admitted in evidence as **Plaintiff's Exhibits Nos. 14-A, 14-B and 14-C.**

Q. Mr. Hadeler, you have testified something with reference to intermediate inventories, a gain might show up because an intermediate inventory might not be correct. Does it make any difference in the total overall computation for either of the two periods as to whether or not the intermediate inventories were correct?

MR. SELVA: We object, if the Court please.

THE COURT: Sustain the objection.

MR. GOLDMAN: Isn't that a matter of expert testimony, your Honor? The average person may not understand that.

[577] THE COURT: No, I don't think it is a matter of expert testimony. I ruled that out the other day.

MR. GOLDMAN: Out of the hearing of the jury. The witness, if permitted to answer, would say "No."

In the hearing of the jury? Your Honor, I asked the witness to prepare an illustration to indicate that particular point so as to make it easily understood in the event that anybody here might have difficulty understanding that and I would like to have the witness be permitted to get this illustration so as to make the point clear as a matter of — as an expert. I can show you what I have in mind.

MR. SELVA: Is that in the form of a question?

MR. GOLDMAN: No. I am making a statement to the Court.

MR. SELVA: We object to this procedure.

MR. GOLDMAN: I can show you what I have in mind as an illustration. (Hands illustration to the Court.) To make it a matter of record, I will proceed with the question.

Q. Mr. Hadeler, have you prepared an illustration indicating what effects, if any, errors of intermediate inventories have on computing shrink for a period of time?

A. Yes, I did prepare such a statement.

MR. GOLDMAN: Would you mark this please?

[578]

Thereupon a document was marked for identification as **Plaintiff's Exhibit No. 15.**

Q. I hand you, Mr. Hadeler, what has been marked as Plaintiff's Exhibit 15, and ask you if that is the illustration you have prepared to illustrate the point?

A. Yes, sir; it is.

MR. SELVA: May I ask you, Mr. Goldman, do you speak of that as an exhibit? That is for identification, isn't it?

MR. GOLDMAN: For identification. I would like, at this time, your Honor, to have the witness explain the illustration and then offer the exhibit in evidence, if I may.

MR. SELVA: We object.

THE COURT: Sustain the objection.

MR. GOLDMAN: I guess to get the matter of record then, will you explain the illustration? I understand an objection is made and sustained to that question, to which we except.

I would like to offer the illustration in evidence. I assume objection has been made and sustained to that.

MR. SELVA: We object to both questions. We enter an objection to the first question on the explanation and

the second question on the offer of the exhibit now [579] marked for identification.

THE COURT: I will sustain both objections.

MR. GOLDMAN: Exception, please, and proffer the exhibit.

Q. Putting the matter another way, Mr. Hadeler, except for the opening and closing inventories for the entire period in question, does any inaccuracy in any inventory make any difference?

MR. SELVA: We object, if the Court please.

THE COURT: Sustain the objection.

MR. GOLDMAN: Out of the hearing of the jury. The witness, if permitted to answer, would say "no."

Q. Mr. Hadeler, you have stated in making the computation that you took the gains and shrinks as shown on the product analysis sheets, subtracted the gains from the shrink and get the net figure as the total?

A. Yes, sir.

Q. Now, is there any other way in which you could have arrived at the same total without doing that, from the product analysis sheet?

MR. SELVA: We object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: Out of the hearing of the jury. If permitted to answer, the witness would say that you could take the opening inventory, add in all the purchases and [580] charge-ins, subtract all the charge-outs and sales and add the closing inventory for the entire period arrived at the same result, ignoring the shrink or gain for any particular week, and ignoring the intermediate inventory.

Q. Mr. Hadeler, if you took the product analysis sheet for those particular periods and took the opening inventory of the first product analysis sheet and added all the purchases and charge-ins for the entire period of each of the

sheets, and subtracted all the charge-outs and sales for the entire period, and then used the closing inventory of the last week of the period, and ignored all intervening inventories, and ignored the gain or shrink for any of the intervening weeks, as such, what would your result be as compared to the result that you obtained?

MR. SELVA: Object.

A. The result should be the same.

MR. SELVA: We object.

MR. GOLDMAN: When there is an objection made, you must not answer until the Court has ruled.

MR. SELVA: We object, if the Court please.

THE COURT: The answer may be stricken from the record and I will sustain the objection.

MR. SELVA: May we be permitted to ask that Mr. Goldman consider the ruling of the Court. We have now been compelled to object four times to the same question rephrased. [581] It puts us in the position of constantly objecting and we regret it and we apologize to the Court for it.

MR. GOLDMAN: I was hoping to avoid the earlier ruling by phrasing the question another way, just hoping your Honor might let it in. I do not wish to run counter to your Honor's rulings.

(Out of the hearing of the jury.) I will proffer the answer that is stricken.

* * *

CROSS EXAMINATION

[602] Q. And in tabulating those results you took the figures of shortages and gains from their weekly work sheets which they had prepared?

A. That is right. I might say further that we knew in general how these sheets were prepared. We had gone over them from time to time. We knew that basically the

procedures were sound. If they followed through they would get a correct answer by following through on the methods and procedures that they had set up.

[640] Q. Now, you have the week of March 18th. If you will look over this you will see how many are in round figures and otherwise, and then we will take the week of April 1st and then we will see the round figures. We won't take the time to add them all up. But you'll see them there. Then we will take the week of April so transferred to cure. You see those round figures more on some sheet than on others as you observe. All right. Then is April 8th. Now we will go over to the next week which is May 7th to cure, and you see the round figures there how many there are and what they indicate. We will take the next sheet, May 14th and you see the round figures.

A. Yes.

Q. We will go to May 27th and you see the — [641] 21st or 22nd with round figures there, and how much they indicate. Well now the others you can go on. I will ask the question. All the other weeks show similar round figures in considerable numbers involving considerable weight. Now I want to ask you as an accountant do you consider figures showing changes from fresh pork to cure in round figures in that manner careful, accurate figures or not?

A. Well it would seem to me you have to be reasonable in all these situations. As I understand it they transfer these in tubs or big vats. Now if a vat normally holds approximately 1400 and you are loading up 10 or 12 vats in a day the overages and shortages might balance out. So if you round them off at 1400 you would be light on the next, so to speak.

Robert Hadeler — Cross

Q Number one, there is no 8 or 10 a day on these steers. There is 3 or 4.

A At 1100 a day. There is one or two, three or four, I don't know.

Q That's right. But I am back to my other question.

A It is not exact accounting. I will grant you that. They could have weighed it down to ounces, or perhaps fractions of ounces. That would have been exact. It would have taken a little more time, and it would not have been significant in the overall.

642 Q So you think the mere fact time after time they transfer from fresh pork to cure, not what a vat or pan sold, you say that is good accounting?

A Well, in the place it is used, it is. I think it is reasonable accounting, yes, sir.

Q You think it is all right to do that in the meat plant?

A When a meat plant is accounting for its cash, I could expect to see the cash in banks started right to the penny. But when they are dealing in transfers from one department to the other, it seems to me reasonable to operate on this basis.

Q And you think it is good accounting?

A I would say it could be justified as good accounting.

* * *

Testimony of Arthur Beerman

DIRECT EXAMINATION

649 Q What is your connection with the Swift Packing Company?

A I am Chairman of the Board.

Q What is your interest in that company?

A Mr. Lowe, there are [illegible] principal owners of

the company. And then, of course, we have quite a few of our – about 60 employees that are stockholders.

Q And in 1950, what was the situation as to the ownership?

A In 1950, Mr. Berry and I were the only principal owners, Mr. Loren Berry.

Q When did you and the other Mr. Berry and possibly the other shareholders, become interested in the Sucher Packing Company?

A In 1944 when Sucher Packing Company was closed up, a group of us bought the assets of the plant and reopened it in January or February of 1945.

Q And have you been interested in it ever since?

A That's right.

Q Did you, at any time, go out to the Sucher Packing Company and spend any considerable amount of time out there?

A In 1948, I believe, towards the middle of the fiscal year, which would have been the early part of 1948, I found it necessary –

[650] MR. SELVA: Now, if the Court please, we move the balance be stricken. Mr. Goldman is waiting for the explanation. He did go out there and that was the answer.

THE COURT: Sustain the objection.

Q Mr. Beerman, what was the occasion for your going out there?

MR. SELVA: If your Honor please, we object to that.

THE COURT: Sustain the objection.

Q Prior to your going out there, Mr. Beerman, were you engaged in the meat business?

A I was a stockholder and part owner of the Sucher Packing Company.

Q Was that your main business?

A No, sir.

Q You went out there. What was your business prior to that time?

A I was in the real estate business as the head of the Beerman Realty Company but I found it necessary in 1948 –

THE COURT Now, just a minute, Mr. Beerman.

MR GOLDMAN Just a moment.

Q What were the conditions at the Sucher Packing Company when you went out there in 1948?

MR SELVA Object, if the Court please.

651] THE COURT I will sustain the objection. I think what you are interested in is what did he do when he got out there.

MR GOLDMAN Also what he found when he got there, your Honor. If your Honor feels that is an improper inquiry as to what he found when he got out there –

THE COURT Yes, I think it would give him an opportunity to state his reasons.

Q Mr. Beerman, tell us when you went out there how long you – what part of the day you stayed when you first went there?

A When I first started out at Suchers, I spent several hours a day, and the situation was so critical –

MR SELVA If the Court please, we move to strike the last three words.

THE COURT They may be stricken.

Q Tell us then, after you stayed there for a few hours a day, did you increase or decrease the time of your staying out there?

A I increased my time until I had moved a cot out there and stayed there 24 hours a day for a long – for several months with short naps in between.

Q During the period that you were out there, did you

take any steps of any kind to prevent or run down any thieves?

[652] MR. SELVA: Object.

THE COURT: Overrule the objection.

A. I found a lack of system.

THE COURT: Just a minute.

Q. State what you did.

THE COURT: The question is: What steps, if any, did you take?

A. Well, we employed Mr. Kenneth Smith and brought him to Dayton. He was formerly auditor and comptroller for a branch office of the Hi-Grade Meat Packing Company. We called in the National Cash Register Company and bought a 2000 machine, or analysis machine. We bought new posting machines. We bought other bookkeeping equipment to modernize, improve the office to the point where we could get to the bottom of the situation.

MR. SELVA: If the Court please, we object to the last remarks of the witness.

THE COURT: That may be stricken, "get to the bottom of the situation".

THE WITNESS: Does that answer your question?

Q. What, if anything, did you do with the employment of detectives?

A. We had quite a number of them. All of the detective agencies in the community, I believe, that are operating had worked for us at various times trying to [653] uncover any theft or thievery.

MR. SELVA: Move the latter part of the answer be stricken.

THE COURT: It may be stricken. The question was: Did you employ a detective agency?

THE WITNESS: We certainly did. Three or four different agencies.

Q Did you make any physical changes at the plant with respect to openings, doors, and things of that sort?

A We put guards on the outside, a guard building. We repaired all our fences. We closed the front yard and permitted customers and employees to come and go through a guarded passage and to the best of my knowledge, everything was checked in and out.

Q Now, Mr. Beerman, what, if anything, was done with respect to – if there was – with respect to closing up any openings?

A For several months we closed up additional entrances and windows, and any areas which were not properly guarded, and repaired, as I said before, the fences. Put new wire over the fenced areas. We added four or five guards that were on duty continuously 24 hours a day, seven days a week. We employed one or two people on the inside through these agencies, like in one case, it was Rose 654 Detective Agency. In another case, it was Sy Yendes, had one or two people there at times. Mr. Merica came in later, and Pfauhl – I think it is Pfauhl or Rose Pfauhl – he had some time with us until we made a change in order to uncover whatever possibilities there were.

Q Now, Mr. Beerman, anything done with respect to the locks?

A The locks were all either changed or added – All coolers, all freezer rooms, were locked up and we entered into – that is, storage holding coolers were entered into only by authorized people who had keys to the lock, the basement freezer rooms and basement pickling rooms. I guess they call them pickling rooms, cellars.

Q Now, Mr. Beerman, while you were out there, did you ever personally catch any employee stealing?

A Well, if I may, I can only talk about some of these incidents that occurred.

Q. That you know about yourself?

MR. SELVA: That he knows about personally, did he say?

THE WITNESS: Yes.

MR. GOLDMAN: Yes.

A. In one case, I was on the dock and a colored employee was leaving, and out of his pants leg was hanging, what I thought was a wiener, or something like that. And, of course, we immediately followed him to the outside gate and when he got through the gate — it was my understanding they had to leave the premises before you —

MR. SELVA: We object to the understanding. We would like him to confine himself to what he did.

THE COURT: Sustained.

A. (continued) — and when I called it to the attention of the employee and the guard, we pulled out a whole stick of wieners in the casings.

THE COURT: When was that, Mr. Beerman?

THE WITNESS: That was during — sometime in 1955, your Honor. We kept no record on the exact date. The only thing we did was to start to discharge the employee. It was still a minor situation, probably amounted to 40 or 50 or 60 cents. Another occasion, we had a foreman in the beet department. I noticed on two or three occasions that he had carried his own aluminum lugs on his shoulder.

Q. What is a "lug"?

A. It is an aluminum container that generally carries about 75 pounds of product and is used for deliveries or for the carrying of fresh products from one cooler to another and in and around the plant.

Q. Continue.

A. They weigh about 15 pounds, but full it is 75 or 80 pounds, and he had two lugs on his shoulder. I [656] think twice in several days I noticed, and I was inquisitive.

wondered why the foreman carried these back from the chilling cooler. They have to go through our shipping cooler in order to get back to the beef department, where he worked, and I think I pushed the lugs off his shoulder, a kind of jarred them a little, and they fell on the floor. And two boiled hams fell out. Of course, in this situation, the employee admitted only these two boiled hams and we recovered them.

Q. What did you do with this employee?

A. He had nine children and, of course, —

MR. SELVA: If the Court please, go ahead.

Q. What did you do?

A. We discharged him, but made no other charges against him, primarily because we recovered the product and in talking to him, he admitted only these two boiled hams.

Q. Mr. Beerman, during the time you were out there was there ever brought to your attention that there was meat products which could not be accounted for on the records of the company?

MR. SELVA: We object.

THE COURT: In 1948?

Q. How long were you out there, Mr. Beerman?

A. I would say from about the middle or early part of 1948 to the early part of 1949.

[657] Q. At any time, during the period that you were out there, was it ever brought to your attention that there was meat product of the company that could not — which disposition could not be accounted for on the records of the company?

MR. SELVA: Object.

THE COURT: Overrule the objection.

A. It started out with —

THE COURT: Just a minute. Answer that question yes or no, please.

A. Yes, sir. Can I explain that?

THE COURT: That answers the question.

Q. Tell us in what way it was brought to your attention.

MR. SELVA: Object.

THE COURT: Sustain the objection.

Q. Ask you whether that was a single instance, or whether there were more than one instance?

MR. SELVA: Object, if the Court please. This is all hearsay, unless this witness personally knows. That is one of the reasons for our objection.

THE COURT: Refer to the books.

MR. GOLDMAN: It was called to his attention in the records.

THE COURT: Refer to the records.

658 MR. GOLDMAN: The next question was whether that was on one occasion or whether that happened more than once.

MR. SELVA: Speaking now of the records being called to his attention?

MR. GOLDMAN: Yes.

THE COURT: Well, I think the pertinency of the question in the first place is somewhat doubtful. There is no materiality to it beyond the fact it was called to his attention and he knew it.

Q. Mr. Beerman, when you went to the Stecher Packing Company in 1938, in what capacity did you go there?

A. I took over the job of the general manager and president of the company.

Q. Now, during the period of time that you were with the Stecher Packing Company, did you have any occasion

to speak to Mr John Macbeth about the situation at Suchers?

MR SELVA We object

THE COURT I will sustain the objection

MR GOLDMAN Out of the hearing of the jury. Exception The answer would be "Yes"

Testimony of Francis E. Merica

DIRECT EXAMINATION

[667] Q Without referring to that employment, coming down to sometime after November, 1948, were you employed by the Sucher Packing Company?

A In, 1949

Q About when were you employed?

A It was in the fall of 1949

Q What did you do on that occasion?

A Well we assigned men out at the Sucher Packing Company at night to watch the fence and see who was coming in and out and whether they were carrying any packages, and such as that, but we didn't find anything.

Q When were you next employed by the Sucher Packing Company?

A In 1950

Q Calling your attention to the 11th day of September, 1950, do you recall going out to the Sucher [668] Packing Company on that day?

A Yes I do

Q When you [illegible] out there what did you do?

A [illegible] we had caught a truck driver

MR SELVA If the Court please, we object to what [illegible] he was asked what he did

THE COURT: Yes, the testimony of this witness should be limited to what he knows himself.

Q. What did you do when you got out there, Mr. Merica?

A. Well, I interviewed a fellow named Harris, that was an employee driving a truck at the Sucher Packing Company. He drove the trash truck and I was informed that he had –

MR. SELVA: Object.

THE COURT: Sustain the objection.

A. (continued) Well, in talking to Harris he told me he had been driving the trash truck.

MR. SELVA: We object to the hearsay testimony, the Court please. Mr. Harris has testified in this case.

MR. GOLDMAN: I think his answer would be admissible on the ground it is a declaration against interest.

THE COURT: Mr. Harris is not a party to the case.

MR. GOLDMAN: I am speaking of a declaration against interest, your Honor. Anything he stole, he would be financially responsible for. An admission of that kind would be a declaration against pecuniary interest.

THE COURT: I would have to see authority on that.

MR. GOLDMAN: We will continue on another subject.

Q. After interviewing Harris, did you interview any other employees?

A. Yes, I interviewed Jackson, Maiden, Hair.

Q. Do you recall an employee named Early?

A. That's right, at that time. I later interviewed all the employees in the entire plant.

[illegible] Q. What did Jackson tell you with respect to the [illegible] of the Sucher Packing Company?

MR. SELVA: We object.

THE COURT: That would get into the same matter.

MR. GOLDMAN: Yes, your Honor, it would.

THE COURT: Sustain the objection.

MR. GOLDMAN: Out of the hearing of the jury. The witness, if permitted to answer, would say that Jackson said that he had been stealing from the Sucher Packing Company for five years.

* * *

Testimony of Ray McConkey

DIRECT EXAMINATION

[674] Q. Please state your name.

A. Ray McConkey.

Q. What is your address, Mr. McConkey?

A. 1227 Brumbaugh Boulevard.

Q. What is your occupation?

A. Superintendent, Sucher Packing Company.

Q. How long have you been superintendent at Sucher Packing Company?

A. Since September of 1949.

Q. And prior to coming to the Sucher Packing Company where were you employed?

A. I was with Peoria Packing Company, Peoria, Illinois.

Q. In what capacity?

A. Superintendent.

Q. How long have you been in the packing business?

A. Approximately thirty years.

Q. And as superintendent of the Sucher Packing Company what are your duties?

A To supervise processing of meats, slaughtering of animals and the packing and processing of meats, meat products.

Q Mr. McConkey, based on your experience, are you able to say – able to tell us the normal shrink due to natural causes that pork should undergo between the hog weight until the time it is chilled?

A Approximately –

MR. SELVA: We object, if the Court please.

THE COURT: I don't know that he is qualified yet by any testimony to answer that question.

Q Well, have you observed, in your experience in the packing industry and at Suchers, the amount of shrink that pork product or dressed hog will undergo between the time they are weighed hot and the time they are thoroughly chilled?

A I have.

Q What is that?

A Approximately 2 to 2½ per cent. That is from the hot weight to sales.

Q From hot weight to sales?

A Yes, sir.

Q How much of that occurs during the immediate chilling process?

A I would say 1½ to 2.

Q Percent?

[676] A Yes, sir.

Q And is there a shrink that occurs during the cutting process?

A Small, probably less than 1/4 of one percent.

Q Now, referring to the cutting process at Suchers, will you describe the cutting process as it took place in 1949 and up until September of 1950?

A Yes. The carcass, the chilled carcass is pushed to a

room which is adjacent. They are on rollers. This room is adjacent to the chill room and they are placed on a roller-top table and each man has his job to do. One man with a saw marks the ham and saws off the feet. Another man pushes the side through a bandsaw which removes the shoulder and then two men with saws that marks the pork loin. The pork loin is removed from the side with a curved-draw knife, the same shape as the pork loin. Then the sides are flattened out, the ribs are removed; bacon is trimmed, hams are trimmed and skinned. The shoulders have the neck bones removed and they are sawed into shoulder, picnics and shoulder butts. There are approximately 20 to 25 men in the room and the trimmings are trimmed out for sausage material and fat is transferred to the lard rendering.

Q. Now, Mr. McConkey, as this work is done, what happens to the hams?

A. The ham when it is finished goes through a [677] chute two floors below in the basement.

Q. When the ham is trimmed, what is done with the trimmings from the hams?

A. The fat trimmings are thrown in a truck and are removed to the rendering, the lard rendering.

Q. What happens to the sides of bacon, the bellies, as they are called?

A. Bellies also go by chute to the grading room in the basement.

Q. What happens to the picnics and the shoulder butts?

A. The shoulder butts are wrapped and placed on a dolly truck and removed to the sales cooler. The picnics go to the grading room also in the basement.

Q. And what happens to the loins?

A. The loins go through a chute to a room below.

where they are retrimmed, wrapped in paper, placed on shelf trucks and removed to the sales cooler.

Q. What about the spare ribs?

A. Go directly in the truck and transferred to the sales cooler.

Q. Now the trimmings that go to the sausage department, are they weighed?

A. Yes, sir.

Q. Is a record kept of the weight?

[678] MR. SELVA: If the Court please, we do not object to Mr. Goldman's testifying, if we might have the opportunity to cross-examine. All these questions are leading.

MR. GOLDMAN: If Mr. Selva wants to cross-examine me —

MR. SELVA: If you would like to take the stand, we would be happy to.

THE COURT: I think these last questions are leading questions.

MR. GOLDMAN: I will agree that they were, your Honor.

Q. Tell us what is done, Mr. McConkey, with respect to the trimmings.

A. Trimmings, when they are removed from the cutting room are weighed and put in a cooler adjacent to the sausage department where they are manufactured in various types of sausage.

Q. Is there any record of any kind made of the weight?

A. There is a transfer sheet made out daily of the product transferred from the pork department to the sausage department.

Q. How about the fats that go to the lard department? What happens to that?

A. They are weighed and entered on a sheet as [679]

the scale where they are picked up each day and go to the accounting department office.

Q. Now, with respect to the portions that go to the sales cooler, what happens to them?

A. I don't get the question, sir.

Q. With reference to the bellies, what happens to them?

A. The bellies are graded into different sizes for curing purposes and for sales, and are placed in cure, in curing vats for smoking.

Q. After they are graded into sizes, are they weighed at any time?

A. They are weighed, and the weight is recorded in what we call our stock book, and placed in vats.

Q. Does this weighing occur before or after the curing?

A. After.

Q. And they are graded in what categories?

A. Usually two-pound range; 10 to 12, 12 to 14, thusly.

Q. As I understand you, they are weighed after they are graded and put in their proper categories?

A. Yes, sir.

Q. How are they weighed?

A. They are placed in a truck and the truck is [680] pushed onto a scale and tares taken off for the weight of the truck, and the weight of the product in the truck is so recorded.

Q. There is evidence in this case, Mr. McConkey, that a number of entries are made in transfer sheets showing even numbers like 1400, or figures of that kind. How are those figures arrived at, if you know?

A. That is a general custom in the packing houses where they are vatting hams or bacon bellies for cure. They put a certain amount in each vat, and if they are putting in 1490 pounds, one piece one way or the other, if it is 1495, it is called 1500, if it is 1505, it is called 1500. They don't

use the odd weight. If it is a piece over-weight, they take a piece off, when they are vatting.

Q. When you say "they are vatting", are these quantities in these vats actually weighed?

A. Yes, sir.

Q. If I understand your statement, then, that vat, the weight is recorded to the nearest —

A. Nearest piece.

Q. Nearest piece?

A. Yes, sir.

Q. In round numbers?

A. Yes, sir.

Q. Now, with respect to the bellies, is the [681] same custom followed there?

A. In our case, no. We wouldn't as a rule. We would use actual weights on bellies. It would depend on what kind of cure. We have different kinds of curing and we wouldn't always use round numbers. We would at times.

Q. At times you would?

A. Yes, sir.

Q. Any part of the animal that may go in the tank at the cutting room, what happens to that with respect to whether it is weighed or not?

A. At one time, we were weighing everything. I am sure it was weighed. It is such a small amount, sometimes it is estimated, but most cases it is weighed.

Q. Now tell me, Mr. McConkey, with respect to the waste in the cutting room. Will you describe what waste there is and what it amounts to? I am speaking now of the waste that is not recovered, that is swept out or hosed out.

A. There is very little.

MR. SELVA: We object to the conclusion of the witness. If there is waste, there is waste, whether it is very little or very much.

THE COURT: Sustained.

Q. Rather than using the comparative term, like "very little", can you characterize it in some amount or [682] some proportion?

A. I would estimate it would weigh under 1/4 of one percent of the weight of the hogs that were cut that day.

Q. And of what does the waste consist?

A. Well, small scraps that would stick to the butcher's knife or maybe fall on the floor, things of that kind, small scraps.

Q. Now, Mr. McConkey, do you recall an incident along about the 11th day of September, involving William Harris, an employee of the Company?

A. Yes, sir.

Q. When you first came to Sucher Packing Company, September 1949, was William Harris employed there in any capacity?

A. William Harris and several others were working what we call "spot labor" or "temporary help", maybe two or three days a week, whenever we would have extra loadings or other general work to do. He was at the time with this group of men that we used.

Q. How long did he continue on this so-called spot labor work?

A. Several weeks before this incident he was put on as a steady employee, taking care of the rubbish and driving the rubbish truck, truck driver.

[683] Q. You recall James Jackson?

A. Yes, sir.

Q. Was he employed by Suchers, when you came there?

A. Yes, sir.

Q. Do you recall Robert Maiden?

A. Yes, sir.

Q. Was he employed —

MR. SELVA: I think the employment records would be the best evidence of this employment, if they want to bring them in.

MR. GOLDMAN: I have no objection to doing that.

MR. SELVA: You have had ten days.

MR. GOLDMAN: I have no objection to doing that.

Q. Now tell us, Mr. McConkey, what happened that you observed, on the 11th day of September, involving William Harris?

A. The truck that was used for removing rubbish from our plant was parked at our front dock and the rubbish was brought down from the various departments and emptied on the trucks. They were brought down in containers. Some were wood, some were fibre board and some were metal, and usually they were emptied scraps of paper and whatnot, were dumped right into the truck. Some wooden barrels had holes, or fibre board, when they got rather beat up, would be sent [684] on out to the rubbish. But this particular morning I noticed a new barrel setting in one corner of the truck with paper on it, apparently full of rubbish, and I thought it rather strange. So, I walked on the truck and examined the barrel and found it contained meat.

Q. Did you find any other meat on the truck in addition to what was in the barrel?

A. We looked around among the papers that were loose on the truck, and I found some other meat.

Q. What kind of meats were they?

A. In the barrel there were smoked hams and on the floor of the truck were fresh shoulder butts.

Q. What did you do?

A. I reported to my superior and had the meat re-

moved from the truck and Mr. Harris was sent to the personnel director and handled from there on.

* * *

CROSS EXAMINATION

[708] Q. You want to tell the Court and jury that in no instance that you know of, that no more than one ham would be added or taken away from a complete vat?

A. I don't know of it ever happening.

Q. Could be one or two hams, couldn't it, in a hundred hams?

A. I see no reason for it to happen.

Q. Would it be?

A. I have never known it to happen.

* * *

[725] Q. Do you know how many tons or pounds of rind are removed from bacon? In the slicing process in a period of a week, or would there be that much?

A. I have no record of it. We save that. As a matter of fact, we save everything but the squeal.

* * *

[732] Q. Your normal shrink here on smoked pork is marked at 1 and ½ percent of normal shrink. Can you tell me whether or not, in your judgment, that is a correct percentage of normal shrink on fresh pork?

A. Fresh pork?

Q. I beg your pardon, smoked pork.

A. That would be rather extreme. It should be a little under that.

Q. You think it should be under 1 and ½?

A. It certainly should not be any higher than that.

* * *

[745] **Testimony of Burton A. Davis**

DIRECT EXAMINATION

Q. State your name, please.

A. Burton A. Davis.

Q. What is your address, Mr. Davis?

A. 1060 North Main Street, Frankfort, Indiana.

Q. What is your business?

A. I am a management consultant, working for Food Management, in Cincinnati, Ohio.

Q. What kind of business does Food Management engage in?

A. We are industrial engineers working solely in meat packing houses.

Q. And for how many years have you been in that work?

A. I've been in that work going on seven years.

Q. For the same concern?

A. Same concern.

Q. Do you have any professional education qualifications?

A. I am a B.S.M.E., Purdue University; that is, mechanical engineering.

Q. As part of your work for Food Management, [746] have you made any studies in packing houses with respect to shrinks in pork products to be expected from evaporation, cutting, process, or other business causes?

A. As part of our work, we install standard costs systems. This involves standard yields and also we have to add on, at the same time, standard shrink of products. Our engineer on the job take tests and very accurately measure the shrink of products.

MR. SELVA. We ask the elaborate answer be stricken and the witness confine his answer to the question.

THE WITNESS: What was your question?

Q. Has your connection with the work involved study of shrinks?

A. Yes.

Q. In about how many meat packing plants have you made such studies that you can recall?

A. In approximately 20 different plants throughout the country.

Q. Mr. Davis, have you had an opportunity to see the Sucher Packing Company?

A. Yes, sir, this morning.

Q. Did you have an opportunity to visit the various parts of the plant, and see the operations as they went on, other than the cooling itself?

A. I saw three of the departments, processing [747] departments and all coolers where products were stored.

Q. Based on your observation of the operation at the Sucher Packing Plant, and assuming that the product goes through the plant in a 24-to a 36-hour period, with the exception of weekends when it would go over from Friday to Sunday evening or Monday morning, I will ask you, based on your experience, you are in a position to state what would be a normal shrink for chilling only from the hot dressed weight of the hog to its condition immediately after it was chilled, but before it is cut.

MR. SELVA: Object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: Your Honor, may I submit there has been testimony that the conditions there today are substantially the same as they were during this period.

MR. SELVA: If your Honor please, we believe that the cooler shrink having been admitted by the plaintiff, in addition to other reasons, is not a subject of impeachment. They have stated a definite cooler shrink and

normal shrinkage in one instance, and this person would not be qualified otherwise.

MR. GOLDMAN: I think that is argumentative, your Honor.

THE COURT: Well, I think he can answer about the results of his experience in the industry.

[748] MR. GOLDMAN: I will rephrase the question.

Q. Based on your experience in the industry, Mr. Davis, what is the normal shrink to be expected from the hot weight, hot dressed weight of the hog to the chilled weight before the hog is cut?

MR. SELVA: We object.

THE COURT: Overrule the objection.

A. One and one-half percent.

Q. Is there a shrinkage that occurs due to loss of product during the cutting process?

A. Yes.

Q. And based on your experience in the industry, what is the shrinkage that occurs during the cutting process with respect to pork?

MR. SELVA: Object.

THE COURT: Overruled.

A. A maximum of one-half of one percent.

Q. What is the amount of shrinkage, if any, that occurs after cutting due to natural causes between the time the cutting is completed and until the time the fresh pork product is sold, based on your experience?

MR. SELVA: Object.

THE COURT: Overruled.

A. All plants throughout the industry use one percent.

[749] MR. SELVA: Move the answer be stricken.

THE COURT: I will sustain the objection. The answer may be stricken.

Q. Is that your experience?

A That is my experience.

Q What would you say would be a fair figure to use, based on your experience in the industry, for the total shrink from the hot dressed weight of the hog, until the fresh pork products are sold?

MR. SELVA: Object.

THE COURT: Overruled.

A Three percent.

Q With respect to smoked pork product, is there a shrink which occurs from the time the smoked pork product comes out of the smokehouse until the time it is sold?

A Yes.

Q Based on your experience in the industry, what is the amount of shrink to be expected?

MR. SELVA: I object.

Q What is the amount of shrink that occurs —

MR. SELVA: Object to that. Are you through with your question? I am sorry. You hesitated and I wanted to get my objection in.

MR. GOLDMAN: I am not through.

THE COURT: State your question, please.

750] Q (continued) — that occurs after leaving the smokehouse, the weight after leaving the smokehouse from the weight 3 to 4 hours after leaving the smokehouse, between that weight and the sales weight?

MR. SELVA: Object.

THE COURT: Overrule the objection, providing the witness knows this, of his own experience. Do you?

THE WITNESS: Definitely.

THE COURT: All right.

A One and a half percent, maximum of two percent.

Q With respect to sausage products, are you familiar with shrinks that occur in pressed sausage and smoked sausage?

A. Yes, I am.

Q. And based on your experience in the industry, what is the amount of shrink that occurs from the time after the sausage is produced, between that time and the time it is sold, with respect to sausage loaves?

A. 2 and ½ percent.

Q. And what, based on your experience, is the amount of shrink that occurs after fresh sausage is made until the time it is sold?

A. 1 percent.

Q. Based on your experience, what is the shrink [75] that occurs in smoked sausage from the time after it is made until it is sold?

MR. SELVA: Object.

THE COURT: Overruled.

A. 3 percent on wieners and 2½ percent on heavier bolognas.

Q. Would you mind naming some of the packing houses where you have made such studies to which you have referred?

A. Yes. At Merkel's in Jamaica, New York; at Trunz in Brooklyn; Albert F. Goetz in Baltimore, Maryland; at the Louisville Provision Company in Louisville, Kentucky; at Field Packing Company in Owensboro, Kentucky; at Stoppenbach Sausage Company, Jefferson, Wisconsin; at Gus Blazer Meats, Ft. Dodge, Iowa; at Mid-South Packers in Tupelo, Mississippi; at Lawton Meat Supply in Lawton, Oklahoma. That is all I can think of right at the present time.

Q. Over what area of the country does your firm operate?

A. Over the entire United States.

* * *

CROSS EXAMINATION

[754] Q. Did you actually weigh any product at the Sucher Packing Company this morning when it came out of the cooler?

A. No.

Q. So you don't know what their shrink is, do you?

A. Judging from my experience and from what I could see—observation I made, I can only judge what their shrink should be.

Q. It is an approximation, isn't it?

[755] A. It should be very, very close.

* * *

STIPULATIONS BY COUNSEL

[808] MR. GOLDMAN: Well, may it be stipulated that Helen Hurt was employed by the Sucher Packing Company beginning 11/27/47 until September of 1950.

MR. SELVA: Yes.

MR. GOLDMAN: And that Robert Maiden was employed at the Sucher Packing Company beginning May 8, 1947 and left the employment of the Sucher Packing Company in September of 1950.

MR. SELVA: Yes, we will stipulate that.

MR. GOLDMAN: That James Jackson entered the employment of Sucher Packing Company on the 26th of February, 1945 and left the employment of the company in September, 1950.

MR. SELVA: It is stipulated.

MR. GOLDMAN: And that Willie Early entered the employment of the Sucher Packing Company, the 3rd of July, 1950 and left in September of 1950.

MR. SELVA: It is stipulated.

Rulings of Court on Admission of Exhibits and Evidence

[809] MR. GOLDMAN: Like to offer in evidence at this time, reoffer in evidence, the weekly folders containing the supporting data for the product analysis sheets which are contained in these three boxes. Some of the information from various folders has been referred to witnesses during the examination, and I believe that for a fair presentation of the data, that they should be available to the jury for consideration.

MR. SELVA: No objection, if the Court please.

THE COURT: They may be admitted.

Thereupon three large cardboard boxes were admitted in evidence as **Plaintiff's Exhibits Nos. 16-A, 16-B and 16-C.**

* * *

[812] MR. GOLDMAN: In connection with the question of whether notice has been complied with, there has been a waiver of notice. I should like at this time to resubmit Plaintiff's Exhibit 10, which your Honor has seen previously, but perhaps your Honor might want to refresh your recollection from it. (Hands Exhibit 10 to the Court.)

THE COURT: I believe I sustained an objection.

MR. GOLDMAN: Earlier, your Honor. I thought in view of subsequent testimony, your Honor might rule differently at this time.

THE COURT: No.

* * *

[824] MR. GOLDMAN: We would now like to offer Plaintiff's Exhibit No. 18.

MR. SELVA: Object.

THE COURT: Sustain the objection.

MR. GOLDMAN: I proffer Plaintiff's Exhibit 18.

* * *

Rulings of Court on Admission of Exhibits and Evidence

[825] MR. GOLDMAN: I will offer in evidence Plaintiff's Exhibit 19. * * *

* * *

THE COURT: Sustain the objection.
MR. GOLDMAN: I proffer Exhibit 19.

* * *

Testimony of Jerome Goldman

DIRECT EXAMINATION

[827] Q. Following the close of yesterday's session with respect to Plaintiff's Exhibit 6, did you instruct Mr. Hadeler to type up a new exhibit, eliminating the beef and veal items, not only physically from the exhibit but the figures and the totals based on beef and veal?

A. I did.

Q. Do you have the computation prepared under that instruction?

A. I do.

MR. GOLDMAN: I will have the reporter mark the same as Plaintiff's Exhibit 21.

Thereupon said document was marked for identification as **Plaintiff's Exhibit No. 21.**

MR. GOLDMAN: I offer the exhibit in evidence.

MR. SELVA: We wish to object to the exhibit, if the Court please, not because Mr. Hadeler is not here. I do not mean to use that as a reason, because he is available, but we do not believe that the exhibit is pertinent at this time.

THE COURT: I will overrule the objection.

Thereupon said document was admitted in evidence as **Plaintiff's Exhibit No. 21.**

* * *

[828] Q. In Plaintiff's Exhibit 21, have the beef and veal items been omitted?

A. They have.

Q. Have the totals, whether gains or shrinks, which appear in Plaintiff's Exhibit 6 for beef and veal, been taken out of the totals on Plaintiff's Exhibit 21 as compared to the totals as were contained on Plaintiff's Exhibit 6?

A. They have.

Q. What do the parentheses around the numbers mean where they appear on Plaintiff's Exhibit 21?

A. Those figures indicate gain or red figures. The Exhibit 21 was prepared on a duplicating machine which did not have red figures. So as to compensate for not showing red, the red figures instead are shown in parentheses.

Q. I call your attention to the fact that in Plaintiff's Exhibit 6 the total which included beef and veal of the column listed "unexplained losses for the 47 weeks ended October 22, 1949", was $104,183.82, whereas, on Plaintiff's Exhibit 21, even with the beef and veal [829] omitted, a total in the same column headed "Unexplained losses for the 47 weeks ended October 22, 1949" is $105,160, which is more than the figures for the same period when beef and veal were included. Is there an explanation for that?

A. There is.

Q. What is that explanation?

A. The explanation is in Plaintiff's Exhibit 6 an actual weight shrinkage was shown which was less than the computed normal shrinkage, giving rise to an estimated gain in beef carcasses which resulted in an estimated gain in

dollars, or in other words, it showed an increase in dollars. The figures in Plaintiff's Exhibit 6 were the net figures after subtracting all gains from shrinks and was the total of $194,183.82 was reached. However, when beef and veal were eliminated, the gain in beef being eliminated resulted in increasing the amount of the total. That is to say, the amount which had been subtracted as a beef gain, was no longer there to subtract and the result was that the total without that subtraction was greater than the net figure was before.

Q. I will ask you if the same situation was applicable to the 48-week period ended September 30, 1950?

A. No, because in that case beef and veal as shown on Plaintiff's Exhibit 6, both show excess shrinkage, [830] and therefore, there was no gain. So that when these figures were subtracted it reduced the original figure of $56,855.08 which was shown on Plaintiff's Exhibit 6 down to $48,192.43. The last figure at the bottom, right hand side, of Plaintiff's Exhibit 21.

Q. I will ask you if you prepared, at Mr. Pickrel's suggestion, or had prepared at Mr. Pickrel's suggestion, revised figures based on the results of Plaintiff's Exhibit 21 which shows the additional adjustments made by the Sucher Packing Company in reducing its claim to the present amount of the claim?

A. I did.

Q. I hand you what has been identified as Plaintiff's Exhibit 22 and ask you what that is?

A. Plaintiff's Exhibit 22 —

MR. SELVA: Have you offered it in evidence?

MR. GOLDMAN: Not yet.

A. Plaintiff's Exhibit 22 is a schedule showing in the first part of it, the figures in Plaintiff's Exhibit 21, there being added thereto the various deductions as stated by

Mr. Solomon, which were used in arriving at the final reduced claim in this case.

MR. GOLDMAN: I offer in evidence Plaintiff's Exhibit No. 22.

MR. SELVA: No objection to 22.

[831] THE COURT: It may be admitted.

Thereupon said schedule was admitted in evidence as **Plaintiff's Exhibit No. 22.**

MR. GOLDMAN: Will you pass copies of that to the jury?

(Thereupon Mr. Smith passed copies of Exhibit 22 to the jury.)

Q. How was Plaintiff's Exhibit 22 prepared physically?

A. It was prepared on a typewriter and for that reason in the case of Plaintiff's Exhibit 22 gains are shown in red figures, whereas, in Plaintiff's Exhibit 21, which was prepared on a duplicating machine, there being no red figures on the same, red figures are expressed instead with parentheses around them in the earlier Exhibit 21.

Q. Would you state what the various parts of the exhibit are?

A. The part of the exhibit to the left of the dividing portion, where two papers are joined together with a piece of tape or paste, is an exact duplication of Plaintiff's Exhibit 21, except for the fact that what is shown as figures in parentheses on Exhibit 21, are shown in red on Exhibit 22. To the right of that under the column headed "Deduction for meat used in employees' cafeteria", [832] are listed the credits about which Mr. Solomon testified for the estimated meat given to the employees' cafeteria for the two periods in question. The computations showing 2400 pounds at the average for fresh pork — at the average figure of 38372 which appears in the average selling price for

fresh pork, or a total of $920.93, for smoked sausage 2400 pounds at .40 cents for a total of $960.40, being slightly more than the average price of the various sausage figures included, making a total deduction for meat used in the Employees' cafeteria for the 47 weeks ended October 22, 1949, $1880.93.

The same figures were used for the next year, although the prices, selling prices as shown, were lower, but nevertheless the higher figures were used for the credit.

Then, in the second last column to the right, deduction for lost products in September, 1950, are the figures based on Mr. Solomon's statement as to the deductions that were made averaging the 48 week period and subtracting 3/48, so the figure $1749.81, is 3/48 of the total for the period in fresh pork; $1028.19 is 3/48 of the total for the period in smoked pork, and $234 is 3/48 of the total for the period in sausage.

In the last column on the right, which is headed "Net amount of loss after deduction for cafeteria [833] meat, last 3 weeks September, 1950", represents the net figures after subtracting from the last column called "Unexplained loss", right before the dividing pasting is done, subtracting from that deduction, so in the last column on the right, the net figures are reached, the figure of $56,755.64, being the original figure of $57,676.57, after subtracting the $920.93.

There is no change in the smoked pork figure because there was no deduction for the smoked pork, the testimony being that none was sent to the cafeteria.

Then, in the figures of sausage, the figure of $7842.52, in the last column to the right, represents the original figure of—and immediately to the left of the pasting, of $8802.52, less the $960.00 in the first deduction column. Then in the next figure below that, $103,279.07, for the total of the three figures above it

Then, for the second period the figures on the right represent the deduction, not only of the amount credited for meat sent to the employees' cafeteria, but the deduction for the (lost products) of September, 1950, subtracting those two amounts from the amount shown immediately to the left of the dividing pasting; again, there being no smoked pork sent to the employees' cafeteria, there is no deduction for that and there is only a deduction for the second period in the lower part of the [834] page for the last three weeks of September, 1950 of $1028.19, giving a net figure in the right hand column of $15,422.98.

And finally, under sausage in the lower part of the page from the figures immediately to the left of the dividing pasting, the figure of $960. and $234. are both deducted leaving $2550.22. Then the total for the second period of $43,299.50 appears in the right hand column and immediately below that is the total for both periods which totals $146,578.57, and below that is a deduction for payments that were withheld from Harris, Jackson, Maiden, Hurt and Early of $208. total, making the adjusted amount claimed in the lower right hand corner of $146,370.57.

* * *

Court's rejection of proffered testimony of Merica

[846] Court met pursuant to adjournment. Counsel being present as heretofore noted, the following proceedings were had out of the presence and hearing of the jury:

(Further arguments of counsel were omitted.)

THE COURT: I think the first question that is before the Court now is the matter of the admission of proffered testimony with reference to statements made by James Jackson. The Court has heretofore sustained an objection to the admission of that testimony. To that decision, the Court will adhere.

* * *

Ruling of Court on Plaintiff's Request To Examine Copies of Interrogations of McConkey and Hadeler

[915] MR. GOLDMAN: Also, at this time, your Honor, on the basis of Hickman v. Taylor, 329 U. S. 495, we should like to be permitted to see copies of the interrogations of Mr. McConkey and Mr. Hadeler, which were taken when I was not present. I believe, under the authority of that case, we are entitled to see them. We have requested of opposing counsel for permission to see them and they have been very indefinite about it.

THE COURT: I don't think this is any time to [916] raise that point.

MR. GOLDMAN: I thought we would make it before we got started, your Honor. May I renew it at the close of examination of the witness, your Honor?

THE COURT: I will give you an opportunity to make a request in the absence of the jury.

* * *

Testimony of Elliot Sachs.

DIRECT EXAMINATION

[920] A. The first column after a description of the item, says at the top "Opening Inventory" and that is set forth in pounds and dollars, and as I will explain to you later, the opening inventory figure is incorrect. The next column is "Purchases" which represents the quantity of product in pounds and dollars purchased by Sucher from outside sources. The next column is entitled "Transfers" and there is a word which is red in it. It means transfers in of product. In other words, this figure here I am reading now "Transfers In, fresh pork, 368,617 pounds", which is the same figure that was taken from the kill sheet which represents the killed dressed weight of the carcasses transferred into production for that week.

Now, chilled dressed weight, as has been [921] testified,

is the weight of the carcasses after it has come out of the chill room where it was placed at the time it was killed and that is known as the chill shrink, and has been seen on I believe it is Exhibit 6, in this instance at Sucher's is referred to as 3 percent.

MR. GOLDMAN: I object to this recitation, your Honor, as it contains conclusions of the witness from statements of what other people have testified to, rather than his own observation.

MR. PICKREL: He said that was on Exhibit 6, which you introduced, and Exhibits 21 and 22 which you introduced, all typed out.

MR. GOLDMAN: He is giving an interpretation on it which is different.

THE COURT: I will overrule the objection.

* * *

[925] THE COURT: You may proceed.

A. Well, on this sheet –

THE COURT: Which sheet is that?

THE WITNESS: The product analysis sheet.

THE COURT: That is, Exhibits 2 and 4?

THE WITNESS: That is right.

A. (Continued) The one I am holding is for the week ending January 21, 1950, and I might add that I have examined all of these product analysis sheets for the entire period involved here and they are the same. I take one example. That does not mean the others are different. They are the same type of paper, the same columns and same results. By result, I mean they include each one and shrink or gain column.

Now, on these sheets there is no column entitled "shrinkage" or "allowance for shrinkage". The shrink or gain column represents only figures showing the gain or loss in weight as a result of an arithmetical computation. It does

not represent shrinkage from process of cutting shrink or holding shrink, or any other type of shrink.

MR. GOLDMAN: I object to the witness stating the conclusion because the plaintiff's witnesses have testified that the 3 percent included that. That is argumentative on the part of this witness.

MR. PICKREL: No. This witness simply says this [926] sheet does not contain any figures for cutting or holding.

MR. GOLDMAN: I have no objection to his saying that it doesn't have a column headed that, but I do object to his conclusion.

THE COURT: Overruled.

* * *

[931] A. For the week ended May 7, 1950, there were a total of 27 transfers. There was 26 in round numbers. That is again in hams and bellies, 27 total. The total transfers in round figures would be 26, and by weight, the total transfers in pounds is 36,945, and the total transfers in round numbers was 35,900.

For the week ended May 27, 1950, there was a total of 43 transfers or 38 in round numbers. The total pounds transferred again limiting it to hams and bellies, and I have done that only for the reason there was far more [932] activity in hams and bellies than in shoulders or callies. Repeating—I am not sure I mentioned it—the total of 43 38 in round numbers, total pounds in hams and bellies 58,500 and 53,200 in round figures.

Q. Now this is inaccuracy—

MR. GOLDMAN: Object to the characterization, Your Honor, that is a matter of dispute.

MR. PICKREL: Well, to this witness it is an inaccuracy.

THE COURT: I will ask counsel to address all remarks to the Court, and not get into arguments between themselves. Mr. Goldman has made an objection.

MR. PICKREL: May I speak of that objection, if the Court please? This witness has testified as to the kind and character of plaintiff's –

THE COURT: May I interrupt? The witness has testified there was an error. Call them errors.

Q. These errors to which you testified, that have arisen in the manner you have indicated, what effect do they have on both – what effect did they have on the source from which they came and the items which go out?

A. They would affect the weight of the product transferred, which is shown in inventory, and they would affect the weight of the product from which it was transferred, specifically in this instance, the fresh pork. [933] So if you have an incorrect factor, in other words, the transfer out, taking something out and supposed to have something left, but if my figure of the part I am taking out is incorrect then the figure of what I have remaining is incorrect. And that is what has happened here.

MR. GOLDMAN: Object to the conclusion of the witness, your Honor. It is all based on his conclusions, it is an error. He has not weighed any of the items.

THE COURT: Overrule the objection.

* * *

[957] Q. What, if any, investigation did you make accordingly, on beef and veal?

A. I examined records relating to beef and veal at the Sucher Packing plant.

Q. Did you examine the records on beef and veal otherwise attached to this yellow sheet?

A. I did.

Q. Part of Exhibits Nos. 2 and 4. Tell the jury, what, if any, difference there is in the system of calculating the progress of beef and veal through the plant than from the progress of pork?

4

MR. GOLDMAN: I object, your Honor, on the ground beef and veal having been withdrawn. No matter what was done with beef and veal, it is immaterial.

THE COURT: I will overrule the objection.

A. There is no difference whatever in the accounting process involved, with respect to beef, pork or veal. In this connection, however, the portion —

THE COURT: Don't volunteer anything.

Q. Well, as compared to the variations of pork, in comparison with the variations on beef and veal, what can you say?

A. Well, as shown on the weekly product analysis sheet, there is much more data contained with respect to pork, because of the number of processes shown on these [958] sheets, than there is for beef and veal.

Q. What can you tell the jury as to the number of various products that come out of pork as compared to those that come out of beef and veal?

A. The analysis sheets themselves, the product analysis sheets themselves have a page devoted to pork only, beginning with the live hogs, pork offal, fresh pork, lard, cured hams, picnics, bellies, other, smoked hams, bellies, skinned bellies, smoked picnics, smoked other, sliced bacon, B. B. hams, raw and finished, and having total processed pork and total for the pork department. Those are the listings on these product analysis sheets.

Q. How many products come out of pork? Tell us that.

A. Quite a number.

Q. Add them up? Look at that sheet and tell us how many different things they make out of a hog carcass.

A. There would be about two types of cured products, two types on the sheet of smoked products, skinned bellies, about half dozen kinds of smoked products and bacon.

Q. Add them all up. Don't break them down. How many total different kinds of products come out of pork?

A. 14.

Q. 14, how many come out of beef and how many come out of veal?

[959] A. Two come out of veal, not counting offal.

Q. How many?

A. Three.

Q. How many out of beef?

A. Four.

Q. Did I request you to prepare a chart on lard sales for the first month of the first period, the first month of the second period and the second month of the second period?

A. You did.

Q. And did you prepare the same?

A. I did.

MR. PICKREL: May I mark it as an exhibit, please?

Thereupon said chart was marked for identification as **Defendant's Exhibit W.**

Q. What is this document that I hand you marked as Defendant's Exhibit W?

A. This is a listing of lard sales by weight and amount covering a period of 16 weeks, specifically, December 4th — these are weeks ended — December 4th, 11th, 18th and 25th, 1948; October 1, 8, 15, 22 of 1949; also November 5, 12, 19, and 26 of 1949; and August 19, 26, September 2, 9, 1950, which I prepared from the product analysis sheets which show lard sales and I have two columns covering weight in pounds and dollar amount, that is, the sales in dollar amount, [960] as well as the weight, of course.

Q. You have added these all up. All right. Let's take them by periods. This first four weeks, first period, how much lard did they sell in pounds?

A. 198,048.

Q. I take it, you took all these figures from where?

A. From the product analysis sheets.

Q. Furnished by whom?

A. By the plaintiff. That is Exhibits 2 and 4. Plaintiff's Exhibits 2 and 4.

Q. And in the first four weeks they sold 198,048 pounds and received how much?

A. $41,275.13.

MR. GOLDMAN: Your Honor, I don't know what relevance lard will have to the claim. It has never been included in the claim.

THE COURT: Overrule the objection.

MR. GOLDMAN: Exception.

Q. Without asking on each one, just give the totals, give the weeks and the totals in pounds and dollars for the other periods, slowly and distinctly, so I can hear it.

A. For the four weeks of October, 1949, total weights sold, 220,966 pounds, for which they received, [961] according to the product analysis sheet, $36,124.57; for the fourth week of November, 1949, the weights sold was 208,206 pounds for which the sum of $29,178.16 was received; for the last two weeks of August and first two weeks of September of 1950, which represents the last four weeks of the second claim period, the total sold was 209,324 pounds, for which the sum of $38,944.33 was received.

Q. Now is that all the lard in pounds or dollars that they sold during these two periods?

A. This particular schedule refers only to the four weeks mentioned.

Q. Is that all that they sold during the entire period?

A. No, sir.

Q. Where do you find other sales reflected?

A. On each product analysis sheet.

Q. But you just added up those that I asked you about.

A. That is correct.

Q. Thank you. You testified that you had examined quite a few of the product analysis sheets. Those are Exhibits 2 and 4, which, by the way, are in two large packages here. You have testified that you have examined probably not all, but quite a few of these product analysis sheets, Exhibits 2 and 4, and the transfers sheets and the [962] inventories, and I hand you Plaintiff's Exhibit 6 for your inspection, which was introduced through Mr. Hadeler, and I likewise hand you Plaintiff's Exhibits 21 and 22, copies of them, heretofore introduced by Mr. Goldman as a witness — trying to get a witness fee out of this case — where on any of these papers, Plaintiff's Exhibits 2 and 4, all of those, all of the transfer sheets that you have looked at, all the inventory sheets that you have examined, Plaintiff's Exhibit 6, the account on which this suit is based, Plaintiff's Exhibits 21 and 22 introduced here — where, on any of them do you find a single figure concerning lard sales?

A. No time.

Q. None of them, is that right?

A. That is correct.

Q. On Plaintiff's Exhibits 2 and 4 for each week, what do you find, information as to whether or not Suchers sold lard?

MR. GOLDMAN: I would like to hear the previous question.

THE COURT: Read the question and answer.

(Thereupon the last several Q's and A's were read by the reporter.)

Q. What do you find, if anything, on Plaintiff's Exhibits 2 and 4, the weekly sheet, concerning lard sales?

A. There is a line referring to lard.

[963] Q. But on the sheets that support the alleged claim on which this suit is brought, Plaintiff's Exhibit 6, Plaintiff's Exhibits 21 and 22, what, if any, credit do you find for any lard sold, either in pounds or dollars?

A. None.

MR. GOLDMAN: I object. It is not intended to include such items.

THE COURT: Overruled.

MR. GOLDMAN: Exception.

• • •

[972] Q. Where, if at all, on all this great multitude of papers plaintiff brought in here, do you find any statement of any kind of any officials, employees or counsel of sucher Packing Company as to any loss by shrinkage, mistake or theft?

A. Nowhere, except in connection with the original chilling shrink.

• • •

[973] MR. PICKREL: You have told us all about it.

MR. GOLDMAN: Not on the paper.

THE COURT: You talked about the same thing and called it something different.

MR. GOLDMAN: The witness is arguing that certain things mean chilling shrink. He says it is in the papers. It is not. I examined the papers during recess.

THE COURT: He testified to shrink, regardless of what it is called.

MR. GOLDMAN: Our witnesses say it is something different than what he says.

MR. PICKREL: Your witness typed it right on this paper, Plaintiff's Exhibit 6.

MR. GOLDMAN: Mr. Smith and Mr. Solomon both testified what that means. He is describing the meaning.

MR. PICKREL: No. I beg your pardon. He simply reads English which anybody can.

Q. So, that, other than Note No. 1, which says 2 percent shrinkage is the allowance for cooler shrinkage, other than that statement, which likewise is found on 21 and 22 prepared by Mr. Goldman, were in all the papers, and all [974] the bosses and all the other, do you find any statement pertaining to calculations of shrink, corrections of errors or theft?

A. Nowhere.

* * *

[980] Q. Now, I am going to ask you to call off some figures, and, Mr. Selva, if I could bother you, you old school teacher, to write them down. I will ask you with what amount of fresh pork we began the first period with which the defendant is charged?

A. In a column entitled "Carcass Weight Processed Pounds", the amount is 9,758,144.

(Mr. Selva puts figures on black board.)

Q. Now, as against that, they report certain sales. So, we will put these now in a little separate column over to the right. Put these credits down as he calls them. How many pounds did they say they sold of fresh pork?

A. 3,970,944.

Q. And how much smoked pork did they sell out of this 9 million pounds?

A. 2,683,782.

Q. And how much sausage do they report that they sold in pounds of this 9 million?

A. 2,237,842.

MR. PICKREL: Now, Mr. Selva, if you will add those real quickly, you will find they amount to 2,683,782, according to Mr. Goldman's figures, which, I am sure, are [981] correct. Rub that out. I gave you the wrong figures

Can't blame Goldman for that. I will read you the figure now, 8,892,568 pounds.

(Mr. Selva puts on blackboard.)

MR. PICKREL: Now, that is the figure so far on what we start with and what has been sold.

Now, do you find any other figures on that exhibit you have that are charged against the defendant?

A. There is a column entitled "Excess Shrinkage in Pounds".

Q. What is the total of that?

A. 265,657.

MR. PICKREL: Now, you will have to add that yourself. Mr. Goldman and I can't help you on that.

(Mr. Selva adds the figures on the blackboard.)

Q. Do you find any figures in pounds that indicate any charge against the defendant in this case?

A. Not in the first period.

MR. PICKREL: Now, if you will, please, Mr. Selva, deduct the total credit from the total charges.

(Mr. Selva does as Mr. Pickrel requests.)

MR. PICKREL: Now, there is 599,919 pounds of pork, the difference between the amount charged and the amount credited by the various sales plus the claim of an excess charge.

[982] Q. Do you find on that bill, or that exhibit that is in your hand any place to account for that 599,000 pounds?

A. I do find, sir, that part of it would be accounted under the titled column "Normal shrinkage".

Q. My dear sir, the normal shrinkage is taken away from weight shrinkage, which leaves the excess shrinkage?

A. That's correct.

Q. Sure. Then why bring that in? Do you find any place where this 599,000 pounds are accounted for on that bill?

MR. GOLDMAN: I object to Mr. Pickrel's asking the witness why he brings that up.

MR. PICKREL: I can't argue with Goldman. I can't argue with the witness. I will wait until I get home. I didn't mean to argue with him. I was just calling his attention.

THE COURT: Well, it may be stricken from the record.

MR. PICKREL: All right.

Q. Now, I will ask you again, do you find anything else in the way of sales or other charges, such as the 265,000 that appear on that bill that you have in your hand that would account for that 599,000?

[983] A. No.

Q. All right. Let's take the second period. What is the total amount of pork charged to the defendant in the beginning of the second period?

A. 17,069,507.

Q. Now that is the total charge. Now, they say they had some sales. How much were the sales in pounds? Of fresh pork?

A. 10,361,164.

Q. And they tell us about some sales of smoked pork.

A. That is 2,699,325.

Q. And they tell us about the sales of sausage. What did it amount to?

A. 2,160,409.

MR. PICKREL: I think, Mr. Selva, Mr. Goldman and I can agree that those three big figures total 15,220,898.

Q. Now, do you find an excess shrinkage item on this bill presented by the plaintiff against the defendant for the second period?

A. I do.

Q. If so, how much?

A. 137 –

MR. GOLDMAN: Your Honor, I object to [984] the characterization as a bill.

MR. PICKREL: Very well.

A. 137,659 pounds.

MR. PICKREL: Then, if you deduct that total from 17 million with which we are charged, and the difference is 1,710,950. Thank you very much.

Q. Do you find any place on that exhibit or account or bill, whatever you call it, that you have in your hand, which is Plaintiff's Exhibit 21 introduced by Mr. Goldman, any explanation of this shortage or any figures that might account for the shortage of 1,710,000 pounds?

MR. GOLDMAN: I object to the characterization as shortage. It is a difference, but not shortage.

MR. PICKREL: I am not going to argue about words. We will call it a difference, to have peace and happiness.

Q. Do you find any figures that would account for that difference of 1,710,000?

A. No, sir.

* * *

CROSS EXAMINATION

[996] Q. Are you familiar with the provisions of the policy that require the claimant to cooperate with the insurance company?

A. In general.

Q. It was not your purpose, when you went to the Sucher Packing Company, to give any cooperation to the Sucher Packing Company?

MR. SELVA: Now, if the Court please, we object to that.

THE COURT: I will sustain the objection.

MR. GOLDMAN: Doesn't that go to the witness' bias?

THE COURT: It does not call for argument.

MR. GOLDMAN: Note exception, please.

Q. Isn't it true, Mr. Sachs, when you went to the Sucher Packing Company, your purpose in going there was to go over their records and find anything you could which you thought would help to beat their claim; isn't that right?

MR. SELVA: We object, if the Court please.

THE COURT: Sustain the objection.

MR. GOLDMAN: Exception, please. I do not wish to counter the ruling of the Court. I wonder if I could speak to the Court? I don't want to appear to be repeating the [997] same subject after the Court has ruled. May I approach the bench?

THE COURT: On that question, I don't think it would be necessary. I don't think that question, or any like it, would be proper.

* * * *

[1002] Q. And you could have determined over that two weeks that you spent out there, had you chosen to stay longer, you could have found out just how many dressed hogs were sold from the sales records during the two periods in question, could you not?

A. I have no idea.

Q. You never made an effort to; is that right?

A. That is correct.

Q. You were advised, however, were you not, that there was a very substantial amount of sales of dressed hogs during those two periods?

A. I was told some dressed hogs were sold.

Q. But you didn't feel it necessary or important for you to determine how many were sold; is that right?

A. It was not part of the program which I had when I went out there, and which I developed while I was there.

Q. You made no effort to find out how many [1003] dressed hogs were sold?

A. That is correct.

* * *

[1004] Q. Now, Mr. Sachs, you did not advise anybody at Suchers that in addition to being an accountant, you were also a lawyer, did you?

MR. SELVA: Object.

THE COURT: I didn't get the question.

(Thereupon the last Q. was read by the reporter.)

THE COURT: I will sustain the objection.

MR. GOLDMAN: Exception.

* * *

[1007] Q. Coming back to the dressed hog sales, Mr. Sachs, when a hog is sold dressed, there is no cutting operation on that hog, is there?

A. No. So far as I know, that would be true.

Q. Therefore, there would be no cutting shrink of any kind with respect to the dressed hog, would there?

A. So far as I know.

* * *

[1022] Q. Based on the assumption, just the mathematics of it, you, as an accountant, not on your knowledge of facts, just on your experience as an accountant, isn't it a fact accountingwise, that if you take a percentage of the weight of the total hog and apply that percentage of the weight of the total hog to fresh pork cuts which constitute approximately only one-third of that total weight, with respect to that one-third of the weight, that percentage is, in effect, multiplied by three?

[1023] MR. PICKREL: May we offer this objection: That is on the theory that they were only going to have anything to do with one-third of the hog. The balance of the hog is all there. It goes for some purpose and,

therefore, the entire hog takes the percentage just the same, whether it goes into ham or trim or fat or even lard, eventually. But it doesn't go into all these things the first day, and so the entire hog takes the shrink, not just 31 percent of the hog takes the shrink. For that reason, we object to the question.

MR. GOLDMAN: The question is based on facts that are in the case, from which arguments can be made later.

THE COURT: I will sustain the objection.

MR. GOLDMAN: Have I restated it wrong? Your Honor admitted the previous question. I was trying to say the same thing again. Maybe I didn't say it the same way. I don't know.

THE COURT: I think the question is involved, for one thing. It poses a hypothetical question to this witness about distributions there. This witness testified from records here.

MR. GOLDMAN: I want to ask him as an expert what happened. He has been put on as an expert. I don't want to have it based on his knowledge of any particular fact. It is a hypothetical question. Would your Honor permit me to [1024] ask a hypothetical question on accounting?

THE COURT: No.

* * *

[1026] Q. My question to you was, that it is a fact, is it not, that for the purpose of this claim that plaintiff has credited a total shrink in fresh pork from hot weight to sale of somewhere between 300 and 350,000 pounds?

MR. SELVA: We object.

THE COURT: Overrule the objection.

A. On the basis of the figures shown on this sheet, that is correct.

Q. And isn't it true that for the second period the

plaintiff has credited a total shrink against the claim from hot weight to sale of somewhere between 560,000 and 600,000 pounds?

MR. SELVA: Object, if the Court please, because on this exhibit we are talking about carcass weight. I don't know what hot dressed weight is.

MR. GOLDMAN: The witness has testified concerning it, your Honor.

MR. SELVA: If the question is ambiguous, without giving the witness the hot dressed weight—this is the first time that has been mentioned. We would like to know what the hot dressed weight is alleged to be.

[1027] THE COURT: He can answer, if he can.

A. I haven't computed it.

Q. Well, will you take a moment and compute it, please?

A. What was the figure you had, Mr. Goldman?

Q. In the second period—

A. Yes.

Q. (continued)—is credited against—in shrinkage, from hot weight to sale, of between 560—I will change that, now after I made a little computation myself. Of between 590,000 and 600,000 pounds; isn't that correct?

A. I imagine it would be, approximately.

Q. It is approximately correct?

A. I imagine so. I haven't checked it right out.

Q. So it isn't true, is it, that in computing a claim that the plaintiff has made no credit for shrinkage?

MR. SELVA: Now, if the Court please, we object to that question because, again, counsel misquotes the evidence. The witness testified he could find nothing in the records, weekly production analysis sheets. Now counsel attempts to ask another question entirely, and it is improper. We object.

THE COURT: I will sustain it.

MR. GOLDMAN: That is not what the witness said. [1028] Mr. Pickrel read him a long list of documents including Plaintiff's Exhibit 6.

MR. PICKREL: Now, if it please the Court, that is absolutely incorrect. I asked him about the weekly analysis sheets, those long, yellow sheets.

MR. GOLDMAN: My recollection is—I think the record is the only way to prove it.

MR. PICKREL: Oh, well—

MR. GOLDMAN: Rather than have a further argument about it, we will proceed to something else.

Q. Regardless of what was said before, Mr Sachs, based on all the papers, including Plaintiff's Exhibit 6, which was sent to the insurance company, there was a shrinkage credited from hot weight to cold, for the first period, first 47-week period, of somewhere between 300,000 and 350,000 pounds, and during the second period of somewhere between 590,000 and 600,000 pounds; isn't that correct?

MR. PICKREL: To which we object, if the Court please, because counsel again attempts to get in all the papers, and the only place that any alleged credit is shown is on Plaintiff's Exhibit 6, which is an arbitrary selection.

THE COURT: I will sustain the objection.

Q. The computation could have been made by the insurance company, had they chosen to do so. It is a fact that from Plaintiff's Exhibit 6, copy of which they received, [1029] that the plaintiff, Sucher Packing Company, was allowing a shrink for the first period of between 300,000 and 350,000 pounds in fresh pork from hot weight to sale, and in the second period in fresh pork from hot weight to sale of between 590,000 and 600,000 pounds.

MR. SELVA: We object. We are getting back into live weight.

MR. GOLDMAN: I didn't say anything . out live weight.

MR. SELVA: We wish to object without pursuing the argument.

THE COURT: I will sustain the objection because I think the question is a double – or triple-barrelled question that I think you are working to the document he has in his hand. Ask him what that shows.

• • •

[1034] Q. At any rate, Mr. Sachs, it is a fact, is it not, that in Plaintiff's Exhibit 6, which is Mr. Hadeler's original computation for the first period, a total of 100,219 pounds in shrinkage was allowed against sausage; isn't that right?

A. On the basis of the percentages you used.

Q. Isn't that correct?

A. That is correct.

Q. And isn't it also correct, that for the second period a total of 97,121 pounds of shrinkage was allowed against sausage?

A. It is included on this exhibit.

Q. That is there?

[1035] A. That's right.

Q. Been on Plaintiff's Exhibit 6 all along, has it not?

A. Since it has been in evidence, Mr. Goldman.

Q. So far as you know, that was on the exhibit that was submitted to the bonding company, correct, is it not?

A. I have no information to the contrary.

• • •

[1037] Q. Then you didn't mean to intimate by your answers to any questions that Mr. Pickrel may have asked you, to which you have said there was no shrinkage allowed, you didn't mean to intimate by your answers that as

far as this claim is concerned, plaintiff was not allowing any shrinkage, did you?

MR. SELVA: We object, if the Court please.

THE COURT: Sustain the objection.

Q. Mr. Sachs, you testified on direct examination as a result of your answers, Mr. Selva put certain figures on the blackboard. Isn't it a fact, Mr. Sachs, that these computations contained on the blackboard have nothing whatever to do with the claim in this case, insofar as its affecting its validity?

A. I can't answer that.

MR. SELVA: We object.

Q. You don't think it has, do you?

A. Every figure has something to do with the claim.

Q. You don't believe, do you, that the figures put on the blackboard are helpful in any way at arriving at whether the claim is correct or not?

MR. SELVA: We object.

THE COURT: I will overrule the objection.

[1038] A. This is a claim of inventory shortage, Mr. Goldman.

Q. Answer my question yes or no. If you wish to explain it, explain it afterwards.

A. I would say it could be related to the claim.

Q. You don't believe it would, do you?

MR. SELVA: We object.

MR. GOLDMAN: I have a right to go into the good faith of the answers.

THE COURT: I will overrule the objection.

THE WITNESS: May I explain my answer?

MR. GOLDMAN: First answer, and then explain.

THE WITNESS: May I have your question again?

Q. You don't believe that these figures are helpful in arriving at whether the claim is correct or not?

A. From an accounting standpoint, I believe they are.

Q. You do?

A. I do.

* * *

[1045] Q. Mr. Sachs, you did say—you did say, that you checked every product analysis sheet against Mr. Hadeler's computation to be sure his computation was correct? Did you not?

A. I did, and I can explain my answer in this respect. Mr. Hadeler's schedule contained certain specific items and I checked these product analysis sheets to see whether the totals, or week-by-week items agreed with Mr. Hadeler's tabulation.

Q. You also took off of each product analysis sheet certain inventory figures for fresh pork and for smoked sausage, did you not?

A. I did, and I will explain my answer about that, too.

Q. You did, didn't you?

A. I did. The reason for taking those totals off was to show the amount in quantity and weight of fresh pork, or smoked sausages, on hand on a given date, to show that this product—I believe the figure for one period was 255,000 pounds of smoked sausage remained in the plant for at least two additional days, and that was the exact reason I did the same thing with respect to fresh pork.

[1046] Q. Regardless of your reason, you did it?

A. I did it.

Q. Now you also said that you examined a great many, although not all, of these weekly folders. Wasn't that your testimony?

A. Yes, sir, and I can explain that, too. The word "examine" is a broad word. When you go through a file which has perhaps hundreds of papers, you look at some

you test others and you may disregard some, but the word "examine", as I say, is a very broad word.

Q. Now, Mr. Sachs, you were interested in determining whether the product analysis sheets had errors in them in copying, weren't you?

A. I was.

Q. And you were also interested in determining whether there were errors in addition, were you not?

A. That's correct.

Q. And one of your purposes in checking through the folders and in checking the product analysis sheets, was to satisfy yourself that the product analysis sheets, to the extent that you examined them, as against the folders, contained the totals in the transfers as shown in the transfer sheets correctly, to the extent that you examined them?

A. That is correct, and I explain that further. [1047] Mr. Goldman, I did not check back further into the amounts shown on the transfer sheet.

Q. I am not asking you about that. I am only asking you whether the totals shown on the transfers sheets, to the extent that you checked them against the product analysis sheets, were the same?

A. In those instances in which I checked them, they were the same.

Q. At any rate, since one of your purposes was to see if there were any errors in copying figures from transfer sheets to the product analysis sheets, you examined a sufficient number of them to satisfy yourself that a further check was unnecessary, isn't that correct?

A. That is correct, with an explanation, Mr. Goldman. "A sufficient number" again is an elastic term. [1048] I had a certain time in which to do certain things, and I had, in addition to the question of checking fresh pork, and

sausages and smoked meats, I was also there to check beef and veal, which were originally included in this claim.

Q. Well, at any rate, you satisfied yourself in the check that you made a further check was unnecessary?

THE COURT: That is repetition of what you just asked him.

MR. GOLDMAN: Well, I think his explanation, your Honor—I don't think it was much of an explanation. That is why I wanted to go back. Very well. What he said is in the record.

Q. Now, Mr. Sachs, if the transfers to lard, as shown on the product analysis sheets, are the same as the transfers shown on the transfers sheets, then the product analysis sheets will show all transfers of lard that are shown on all transfer sheets, is that correct?

MR. PICKREL: To which we object.

THE COURT: Sustain the objection.

MR. GOLDMAN: May I ask, your Honor, why I can't go into that?

THE COURT: Well, I think it is argumentative. It asks the witness for a conclusion which you can argue at the proper time.

MR. GOLDMAN: He has stated the conclusions, [1049] your Honor, and I wish to test them.

Q. Now, it is a fact, is it not, Mr. Sachs—

THE COURT: Just a minute. I sustained the objection.

MR. GOLDMAN: I'm asking him something else.

THE COURT: I thought you said "that is a fact."

MR. GOLDMAN: No, I said "it is a fact". Starting another question.

Q. It is a fact, is it not, Mr. Sachs, that the product analysis sheets, if they reflect the transfers as made to

lard, will show what happened to the fresh pork insofar as lard is concerned?

MR. PICKREL: To which we object. They speak for themselves. That is the same question.

THE COURT: I will sustain the objection.

MR. GOLDMAN: May I address the Court, your Honor? What I am trying to develop is to test the witness' conclusions stated yesterday. I don't want to argue in the presence of the jury.

THE COURT: No. I don't think that is necessary.

* * *

[1052] Q. Didn't you check the transfers-out to lard, Mr. Sachs?

[1053] A. I say, in my examination of these weekly holders, certain transfers of cutting fats. I didn't examine them because they were not included in this claim and, as I recall, they also were in round numbers.

Q. They were not included in this claim, that is correct, is it not?

A. On this sheet Exhibit 6—

Q. Just answer my question. The answer can be yes or no and if you have an explanation, add it.

MR. GOLDMAN: Would you read the question to the witness?

(Thereupon the last Q. was read by the reporter.)

A. My answer is no, and I will explain it, Mr. Goldman. The claim as such, as I understand it, appears on Plaintiff's Exhibits 6, 21 and 22, and on these sheets that you have before you, too, I find no reference to lard.

Q. So, they are not included in this claim—lard is not included in the claim?

MR. PICKREL: To which we object. He said it does not appear on the sheet. Whether it is included in the claim in some other way, we don't know.

Q. To your knowledge Mr. Sachs, there is no lard included in this claim?

MR. PICKREL: To which we object. The paper has been introduced and sets out the claim and it speaks for [1054] itself.

THE COURT: He may answer, if he can.

THE WITNESS: Read the question, please, Miss Fischer.

(Thereupon the last Q. was read by the reporter.)

A. I find no reference to lard upon Exhibits 6, 21 and 22.

Q. And to your knowledge, there is no lard included in the claim; is that correct?

A. So far as I can say, Mr. Goldman, the claim is in these Exhibits 6, 21 and 22.

* * * * *

[1055] Q. What experience have you had in packing houses?

A. I have examined other claims involving packing houses.

Q. How many have you examined?

A. Two or three, perhaps. But I don't recall.

Q. Two or three. Now Mr. Sachs don't you know that the final lard product involves rendering the fats that go into it?

A. I've heard it, Mr. Goldman.

Q. And the quantity of the lard that may be sold will be considerably different from the quantity of fat [1056] going into the product, as raw material; isn't that a fact?

MR. PICKREL: We object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: Your Honor, I would appreciate it if I might address the Court on the subject because I think

I wish to attack the witness' conclusions and I would like to lay some foundation for it.

THE COURT: The last question before me was a statement which could be obvious not at all what the witness testified to, and I think the objection is well taken.

MR. GOLDMAN: May I state my purpose in these questions, your Honor?

MR. SELVA: May it please the Court —

THE COURT: No, I don't think that is necessary.

* * *

[1059] Q. That being the case, Mr. Sachs, subtracting sausage which includes beef, from fresh pork, doesn't it give you a result which has much meaning, has it?

MR. PICKREL: To which we object.

THE COURT: I will sustain the objection.

Q. If it be a fact, Mr. Sachs, that the end lard product is substantially different weight from the raw materials making up the lard, using the end lard product, would have no effect — strike that. — wouldn't be helpful in determining the fresh pork item, would it?

MR. SELVA: We object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: May I ask your Honor what my trouble was with that one?

THE COURT: Well, it is an endeavor to draw a conclusion from the witness which you, yourself, can draw at the proper time from the facts that are in the record, and that have been testified to.

MR. GOLDMAN: Your Honor, yesterday (I) made such a conclusion with respect to these figures. I am attempting to show that these figures have absolutely no meaning whatever.

MR. SELVA: May it please the Court, if Mr. Goldman [1060] insists on arguing each motion, may we have the

argument in the absence of the jury, or engage in equal argument?

MR. GOLDMAN: I have no objection to having it in the absence of the jury.

MR. SELVA: Either way, we would like to reply.

THE COURT: Mr. Goldman, the objection is that you attempt to make your argument as you go on with the witness; draw conclusions which you, yourself, may draw at the proper time for the benefit of the jury from the figures and from the facts testified to. Please proceed.

* * *

[1064] Q. It is true, is it not, from your examination and from whatever source you may have gained it from, whatever source you may have gained it, that the weight of smoked pork after having gone through the cure and smoking process, is substantially different from fresh pork?

MR. SELVA: We object.

THE COURT: I will sustain the objection.

* * *

[1065] Q. Now, let me ask you this question: To the best of your knowledge, you believe, do you not, that the weight of the smoked pork coming out of the smokehouse, is [1066] different from the weight of the fresh pork making up that smoked sausage?

MR. SELVA: We object.

MR. GOLDMAN: I asked this witness yesterday whether he believed that this figures had any bearing on the case, and after some hesitation he finally said he did believe it. I am going into his belief to attempt to show he –

THE COURT: I will sustain the objection.

MR. SELVA: May we ask the Court to instruct the jury to disregard the remarks of counsel during argument?

THE COURT: The jury may disregard the remarks of counsel.

* * *

[1068] Q. You don't mean to say, however, Mr. Sachs, that subtracting smoked pork after it has gone through the [1069] process of curing and smoking, and subtracting sausage which has beef in it and spice and other items, gives you any result that can tell you what has happened to the fresh pork?

MR. SELVA: We object.

THE COURT: Sustain the objection.

* * *

[1072] Q. Now, you say that you prepared Exhibit W which shows lard sales for certain months of the year.

A. That is correct, and I want to explain. I was requested by Mr. Pickrel to furnish him with the pounds and amount received by the plaintiff for lard sales during 16 specific weeks, which I did, taking the information solely from Plaintiff's Exhibits 2 and 4, which are the product analysis sheets.

Q. And as far as you know, however, this information of the final lard product as sold for certain isolated periods was nothing that you considered as having any probative value one way or the other as to this claim?

MR. SELVA: Object.

THE COURT: Sustain the objection.

MR. GOLDMAN: I would like to ask a different question. May I suggest it to you in advance so I won't run into any accusation of my attempting to ask the same [1073] question over again?

THE COURT: In a different way stating the same thing?

MR. GOLDMAN: I think it goes a little beyond that, your Honor. I don't want to appear to be ignoring the ruling of the Court.

THE COURT: Well, ask the question.

Q. It is a fact, is it not, that the figures on Exhibit W, lard sales, do not help determine one way or the other the merits of this claim?

MR. SELVA: Object.

THE COURT: Sustained.

* * *

[1075] Q. If it be a fact, Mr. Sachs, that hams and bacon in their respective categories and classifications, or grades, were actually weighed in carts, that they were then placed in vats designed to hold 1400 or 1500 pounds, or 1600, depending on the size of the vats, and they were [1076] filled from these carts which were actually weighed to the nearest ham or bacon, to the round figure of 1400 or 1500 or 1600, or whatever it might be, would you say that using round numbers under those circumstances represented substantial inaccuracy?

MR. SELVA: Objection.

THE COURT: Sustain the objection.

MR. GOLDMAN: Your Honor, he has given an opinion as to why he thinks it is inaccurate. My question was hypothetically based on what has been testified.

THE COURT: Adhere to the rule.

Q. Now, it is the practice, is it not, in insurance company procedure, to make many of their determinations on statistical basis? That is true, is it not?

MR. SELVA: We object.

THE COURT: Sustain the objection.

Q. It is true, is it not, Mr. Sachs, that when you are dealing with a large number of transactions in this case, you are dealing with a large number of vats, which might be a fraction of a ham or bacon over or under, over a considerable period of time? Isn't it a fact that statistically and

mathematically the average over the period of time for the large number will be the round numbers used?

MR. SELVA: Object.

THE COURT: Sustain the objection.

* * *

[1077] Q. Mr. Sachs, yesterday you stated that you had examined the beef and veal product on these sheets; is that correct?

A. That is correct.

Q. Do you know that it is a fact that beef carcasses are hung in shrouds? They call them shrouds. They are cloths which are wetted. Do you know that?

A. I observed the fact that beef is hung in shrouds in the kill room.

Q. Do you know, for that reason it is difficult to get an accurate weight on beef?

MR. SELVA: If the Court please, we object to that question. I understand beef and veal are withdrawn from the case.

MR. GOLDMAN: They went into this yesterday. This is simply to show why beef and veal were withdrawn from the case. They made it appear there is some mystery about it.

MR. SELVA: We object.

[1078] THE COURT: I will let him answer this question.

THE WITNESS: Please read the question.

(Thereupon the last Q. was read by the reporter.)

MR. SELVA: That is a conclusion.

Q. Do you know what, Mr. Sachs, because of the shroud and the water that may be in the shroud, –

A. I can only say, Mr. Goldman, that is not my understanding.

Q All right. Do you know as an actual fact that beef is permitted to hang in the cooler so as to age longer than pork product? Do you know that?

MR. SELVA: Are you speaking now of the Sucher Packing Plant?

MR. GOLDMAN: Yes. Beef is permitted to hang for a longer period of time so as to permit it to age.

MR. SELVA: We object to that.

THE COURT: Well, there is no claim for beef or veal in this case.

MR. GOLDMAN: That is correct.

THE COURT: I think there is no point in going into it.

MR. GOLDMAN: The only reason I did is because they asked him yesterday to make it appear there was some mystery about it.

MR. SELVA: Now that counsel has suggested there [1079] is some mystery, we withdraw our objection. Go ahead. We have nothing to hide.

THE COURT: The Court has an objection that is —

MR. GOLDMAN: Your Honor wishes to end this at this time.

THE COURT: I have ruled. We will not go into beef or veal.

Q When you prepared this Exhibit W at Mr. Pickrel's request, which listed lard as well by weight and amount, you obtained the information from the product analysis sheets, did you not?

A That is correct.

Q And these are part of Exhibits 2 and 3?

A That is also correct.

Q That being the case, the following testimony which you gave yesterday, which I am about to read to you, by Mr. Pickrel: "You have testified that you have examined

probably not all, but quite a few of these product analysis sheets, Exhibits 2 and 4, and the transfer sheets and the inventories, and I hand you Plaintiff's Exhibit 6 for your inspection, which was introduced through Mr. Hadeler, and I likewise hand you Plaintiff's Exhibits 21 and 22, copies of them, heretofore introduced by Mr. Goldman as a witness — trying to get a witness fee out of this case — where, on any of these papers, Plaintiff's Exhibits 2 and 4, all of [1080] those, all the transfer sheets that you have looked at, all the inventory sheets that you have examined, Plaintiff's Exhibit 6, the account on which this suit is based, Plaintiff's Exhibits 21 and 22 introduced here, — where, on any of them, do you find a single figure concerning lard sales? Answer: No time. Question: On none of them; is that right? Answer: That is correct." That statement by you yesterday was untrue, was it not.

MR. SELVA: Just a minute. That is a beautiful recitation. We object. We ask the jury to disregard it. It is beautiful arguments and we would like an opportunity to reply. We object to the question.

THE COURT: I will sustain the objection to the question.

MR. GOLDMAN: To the form of the question?

THE COURT: You are asking the witness whether that is untrue.

Q. Your statement yesterday was not correct?

MR. SELVA: Object.

MR. GOLDMAN: Any objection to that, your Honor?

MR. SELVA: We objected before. Didn't you hear us? We object.

THE COURT: I will sustain the objection. I think he may show in any respect if it is not correct.

MR. GOLDMAN: I just asked him whether he got [1081] the figures on the exhibit from the product analysis

sheets. He said yes, the lard sales figures. And then yesterday he said that they are nowhere on there.

THE COURT: Then you have the question answered and it is a question for the jury to determine whether or not it is true or untrue, or correct or incorrect.

Q. May I ask this question, Mr. Sachs, I hope I don't go beyond what I should. Which statement is correct, the one you made yesterday or the one today?

MR. SELVA: We object, if the Court please.

THE COURT: Sustain the objection. That is a question for the jury.

* * *

[1082] Q. Mr. Sachs, were the following questions and answers asked you yesterday: —

THE COURT: Now, just a minute. I don't believe that is proper.

MR. GOLDMAN: I have already laid the foundation in yesterday's cross-examination, and there was a quarrel as to what the record showed. Now, I have had it written up.

THE COURT: You are proceeding on an entirely erroneous basis. It is proper to cross-examine a witness on some prior statement that he has made, for the purposes of testing his credibility. The statement you have there is the statement this witness made in court, and the Court and the jury has heard it, and to use it as you would use it as a deposition or some other prior statement, is improper.

* * *

[1085] Q. So, with respect — except with respect to the shrink, put that in there, too, except with respect to any shrink, any errors in accounting or weighing, or approximating, or anything of that kind that might be made in one intermediate inventory or another, another intermediate inventory washes itself out?

MR. SELVA: We object.

MR. GOLDMAN: Isn't that correct?

THE COURT: I will sustain the objection.

MR. GOLDMAN: What is the ground for that, your [1086] Honor?

THE COURT: Well, I consistently throughout the plaintiff's testimony, said this matter is not a matter for expert testimony. It is a matter which can be demonstrated by arithmetic and it is not a proper question to ask the witness.

MR. GOLDMAN: I only asked to test his conclusions that he has reached. It is for a different purpose at this time.

THE COURT: I don't think it tests any conclusions. Proceed.

* * *

[1087] Q. Now, Mr. Sachs, my question to you was whether it is not a fact that you would come out with the same figures that Mr. Hadeler had in his computations, and which appear on Plaintiff's Exhibits 6, 21 and 22, if you [1088] had simply used the opening inventory of the first week periods and the closing inventories of the last week periods and ignore all the intervening inventories, and in addition, using the opening and closing inventories, use simply charge-ins and charge-outs based on the product analysis sheets?

MR. SELVA: We object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: I don't understand your Honor's ruling.

THE COURT: Well, you are mixing up a possible hypothetical situation with a situation that appeared out of that. As I have said before, that question is one that is capable of mathematical demonstration to the jury. It

anyone else, and depends on accurate inventories at beginning, accurate inventories at the end, and accuracy of incoming and outgoing items.

MR. GOLDMAN: I must phrase the question improperly, but I want to find out based on these figures, whether they are right or wrong, whether you would come out with the same answer. I am not trying to show here that the figures are right or wrong, but whether you would come out with the same answer that Mr. Hadeler got by using the product analysis sheets at the beginning inventory period and ending and ignoring all intervening inventories, just [1089] taking the charge-ins and charge-outs, whether you get the same results.

THE COURT: That, too, is a question capable of mathematical demonstration.

MR. GOLDMAN: In order to attack the statements he made, a great deal of time was spent on intervening inventories, and I want to preface this to get this question in before I reach that one in preparation for subsequent questions.

MR. SELVA: We don't want to argue our motion. There may have been two dozen ways of doing one thing. The plaintiff has chosen this way to do it. Whether it could have been done another way, depending on accurate or inaccurate figures, seems to be beside the point, except to distract the situation, and we object.

THE COURT: I will adhere to the ruling made.

Q. It is a fact, is it not, Mr. Sachs, that if you were to take the opening inventory period and the charge-ins and charge-outs, and the closing inventory period, as shown on the product analysis sheets, you could take these intervening inventories and throw them in the wastebasket, it wouldn't make any difference?

MR. SELVA: To which we object.

THE COURT: Sustain the objection.

[1095] Q. All right. Now, Mr. Sachs, from your experience as an accountant, in view of the large quantity of products flowing through the plant as compared with the amounts in the opening and closing inventories, even assuming that there might have been inaccuracies due to taking round numbers, isn't it a fact that any possible [1096] error on that account in the opening and closing inventory would become insignificant in arriving at the total shrink for a period of 17 weeks or 45 weeks, as the case may be?

MR. SELVA: We object, if the Court please.

THE COURT: I will sustain the objection.

Q. Now, yesterday, Mr. Sachs, you agreed that Sucher Packing Company did allow, as against any claim in this case, a total shrink from hot weight to sale of fresh pork for the first period of somewhere between 300 and 350 pounds and for the second period of somewhere between 500 and 600—I mean 350,000 pounds and for the second period between 500,000 and 600,000 pounds. I think you also agreed that the Sucher Packing Company allowed as a shrink against the claim as so-called normal shrink, the totals shown on Exhibits 21 and 22, of over 33,000 for smoked pork for the first period, over 100,000 pounds for sausage in the first period, over 34,000 pounds for smoked pork in the second period and 97,000 for sausage in the second period. Now, if—

MR. SELVA: Is that a question?

MR. GOLDMAN: That is the preparatory part of the question.

Q. (continued) Now, if the amounts of shrinkage allowed as normal against this claim are adequate and if

the round numbers to which you object in the transfer sheets, [1097] in fact, do substantially correctly state the figures, isn't it a fact that the only explanation that you can think of to account for the excess shrink would be a disappearance as a result of some dishonesty?

MR SELVA We object

THE COURT I will sustain the objection

[1099] Q You stated yesterday, did you not, that you did not know the amount of profit in the sales price figures [1101] that were stated on Plaintiff's Exhibits 6, 21 and 22, is that right?

A That is correct

Q As a matter of fact you don't know whether there is any profit in there at all, do you?

MR SELVA We object

THE COURT Sustain the objection

Q You made no effort to determine whether there was any profit in there, did you?

MR SELVA We object

THE COURT Sustain the objection

[1103] Q Now did you make any efforts to determine the market value of the merchandise involved?

MR SELVA We object to that at the Court please

THE COURT I will sustain the objection

Q Mr Sachs based on all that has gone here this morning with respect to figures, do you still say, bearing in mind all that has been testified to, do you still say that the figures on this blackboard have any reasonable connection with the validity or invalidity of the claim in this case?

MR SELVA We object

THE COURT Sustain the objection

[1113] MR. GOLDMAN: Your Honor, the other morning I asked that we be permitted to inspect what was supposed to be a transcript of an interview between Mr. Greene and Mr. McConkey and between Mr. Selva and Mr. Hadeler, copies of which we have never been furnished and I was not present at those interviews and opposing counsel haven't seen fit to give me copies of them, and I have asked for the same, and I believe we should be entitled to see those.

(Arguments of counsel omitted.)

THE COURT: I will overrule the motion. You have evidence to offer on rebuttal?

* * *

Testimony of Arthur Beerman.

DIRECT EXAMINATION

[1114] Q. Mr. Beerman, what was the market value of the merchandise in the various categories which are subject to claim in this case at the time the merchandise was supposedly, or it is claimed, that the merchandise was stolen?

* * *

[1116] Q. What was the reasonable market value, Mr. Beerman?

A. The market value of the product is established to the Sucher Packing Company would include a profit of from 1 to 2 percent on the whole volume. It is not charged in poundage.

MR. SELVA: Now, if the Court please, we move that answer be stricken. It is not responsive.

THE COURT: Objection sustained. The question is market value of the different products involved here. You will have to take up the different products.

THE WITNESS: I don't understand the question then. Are you asking me what the market value was on all of our products?

Q. No. The products involved in the claim, at the periods—

MR. SELVA: We object to that.

MR. GOLDMAN: I will show Mr. Beerman what we have in mind.

Q. Hand you, Mr. Beerman, three exhibits which are all identical, with respect to the question of the [1117] average selling price of the product, and I will ask you to state, during the period of—the first period of 17-weeks ended October 22, 1949, what was the market value for fresh pork and ham?

* * *

THE COURT: I will sustain the objection for the [1118] reason the witness has no independent recollection of it at all, and to hand him papers and ask him to read off what is on the papers, I don't think is evidence of the fact you are attempting to prove.

THE WITNESS: I am acquainted with these papers.

Q. Let me ask you this, Mr. Beerman. What relation did the selling price, in the periods in question, bear to the market price?

MR. PICKRELL: To which we object again, unless there is some basis.

THE COURT: Sustain the objection.

Q. Mr. Beerman, you were active at the Sucher Packing Company during this—you testified during these periods you spent your full time there and part of the time you weren't there but kept close tab on it. Were you familiar with the market prices during those periods?

A. I certainly am, and I still am.

MR. SELVA: Just a moment.

THE COURT: Overruled.

Q. With respect to the selling prices in effect at that time, Mr. Beerman, what relation did the market price bear thereto?

MR. PICKREL: I think we will object for the reasons heretofore stated. Plus the fact they are part of the chief. And if they are trying to show some imaginary [1119] difference between selling price and market value, it is altogether improper and we object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: (Out of hearing of the jury.) If the witness were permitted to answer, he would say that the market price was substantially the same as the selling price for the products in question during the periods in question.

Q. What was the cost of producing the products involved in the claim during the periods in the claim in relation to their selling price?

MR. PICKREL: To which we object for the same reason.

THE COURT: I sustain the objection.

MR. GOLDMAN: The average selling price is stated, your Honor. On the exhibits.

THE COURT: That is not evidence of the selling price.

MR. GOLDMAN: And it has been stated that these figures were taken from the records of the company. They are shown and the selling prices are also shown on the product analysis sheets. Actually, the cost of production are shown on the—could be computed from these three boxes that are in evidence, boxes of papers in evidence. All the figures are in there which make up the production cost.

[1120] THE COURT: I will sustain the objection.

MR. GOLDMAN: Out of the hearing of the jury.

it permitted to answer, the witness would say that the cost of production was between 1 and 2 percent less than the sale price during the period in question for the products in question.

[1121] Q. Are you able to say without refreshing your recollection, Mr. Beerman, from some document,—can you tell from your recollection alone today what the prices were, market prices were, back in 1949 and 1950 of the products involved in the claim?

MR. PICKRELL: To which we object, unless he names [1122] the product and the time.

THE COURT: I will overrule the objection.

MR. GOLDMAN: Answer the question.

A. I could only state—

THE COURT: Well now, the question calls for ayes or no.

A. I can answer it yes, but with an explanation, your Honor, if I may.

MR. GOLDMAN: I guess your Honor won't object if there is a qualified yes.

THE COURT: If he explains his answer.

Q. Don't give your prices in the answer.

A. I merely want to explain what I think your Honor is interested in, and the jury, and I came here to tell what I know.

[1123] THE WITNESS: I want to explain it, your Honor, if I may. I don't know anything about the legal phases. I think we are interested as laymen to get this thing threshed out.

MR. PICKRELL: You come down and join the lawyers and make your speech.

THE COURT: You may explain your answer, but you can't make a general statement.

A. (continued) I know that the prices, the average prices, as used, were the market prices and I know they included a profit of not over 2 percent when it was figured for the market. There are very few meat packers that ever make more than—

MR. PICKREL: Now please. I move to strike out that entire statement as being immaterial to this case.

MR. GOLDMAN: I think his explanation has been why he said he could give an answer.

MR. PICKREL: Now, if it please the Court—

THE COURT: I will sustain the motion to strike [1134] the answer as not being responsive to the question.

* * *

REQUEST FOR SPECIAL INSTRUCTIONS AND RULINGS THEREON

[1127] THE COURT: Do you have your special instructions?

MR. GOLDMAN: Yes, I do, your Honor.

The following are the Requests for Special Instructions by counsel for plaintiff:

"INSTRUCTION NO. 1 – Under the terms of the policy of insurance issued by the plaintiff to the defendant defendant's liability is limited to $20,000.00 of any loss to plaintiff through larceny, theft, misappropriation, wrongful abstraction, willful misapplication, or other dishonest or fraudulent act or acts by each identifiable employee acting alone or in collusion with others. In this case it is claimed by the plaintiff that a portion of its claimed loss was due to a ring of dishonest employees, consisting of Jackson, Harris, Maiden and Hurt, who plaintiff claims was operating for at least almost two years prior to September [1127a] 11, 1950, and that Willie Early, a fifth em-

ployee, was a member of the ring for a short period prior to September 11, 1950.

If you find from the evidence that Harris, Jackson, Maiden and Hurt, did, during the period claimed, act in collusion with each other, and while so acting did cause plaintiff to sustain a loss through their dishonesty while acting in collusion with each other, plaintiff is entitled to recover the amount of such loss not in excess of $80,000.00. If you further find that the employee Willie Early, was a member of such group and that while he was a member of such group, acting in collusion with the other members of the group, such group of employees caused an additional loss to the plaintiff through their dishonesty, then to the extent of such loss, plaintiff is also entitled to recover the amount of such additional loss but not to exceed another $20,000.00.

If identifiable employees of plaintiff were acting in collusion with each other as part of a ring of thieves stealing property of plaintiff during the policy period, it is not necessary that plaintiff show the amount of loss attributable to any particular employee in the ring alone, but may recover for the total amount of the loss caused by such ring through dishonesty, not in excess of the number of identifiable employees in the ring, times $20,000.00. Since plaintiff does not claim more than five identifiable [1427-b] employees caused loss to plaintiff through their dishonesty, under any circumstances your verdict cannot exceed $100,000.00, even if you should find that plaintiff suffered loss through the dishonesty of such identifiable employees and that such loss was in excess of $100,000.00.

INSTRUCTION NO. 2 - In this case the defendant had the witness Harris identify a certain statement signed and given by the witness to detective Merica. If the statement contradicted testimony on the witness stand by Harris,

the defendant had the right to introduce the same in evidence. This the defendant did not do. You as jurors have the right, but are not obligated, to infer from defendant's failure to offer such statement in evidence, that such statement did not contradict Harris' testimony or that it was to defendant's interest not to introduce such statement in evidence.

INSTRUCTION NO. 3 — There has been testimony that detective Merica obtained written statements from certain employees of plaintiff accused of theft from plaintiff. Under the law, plaintiff did not have the right to introduce such statements in evidence.

INSTRUCTION NO. 4 — The Court charges you that your verdict in this case must be for the plaintiff, as the defendant has admitted that plaintiff did suffer a loss through employee dishonesty during the policy period. There is a dispute between the parties as to the amount of plaintiff's [127-c] loss. Subject to the limitations stated to you elsewhere in the Court's charge, your verdict shall be in such amount as under the Court's instructions, you determine that plaintiff sustained loss through larceny, theft, embezzlement, misappropriation, wrongful abstraction, willful misapplication, or other dishonest or fradulent act or acts of any employees of plaintiff acting alone, or in collusion with others.

INSTRUCTION NO. 5 — Defendant in its Answer in this case has alleged that plaintiff failed to give proper notice and proof of loss under the policy or to cooperate as required by the policy. The Court charges you that there has been no proof to support such allegations, and that such allegations are of no avail to defendant.

INSTRUCTION NO. 6 — The Court has admitted in evidence the indictment and plea of guilty to the crime of grand larceny in a state court prosecution of one of the

Request for Special Instruction and Rulings

witnesses who appeared in this case, James Jackson. Under the laws of Ohio, the crime of grand larceny involves a theft of property valued in excess of $35.00, the value of $35.00 being the dividing line between the crime of petty larceny and grand larceny.

INSTRUCTION NO. 7 - If you find that the plaintiff has suffered a loss or losses at any time or times during the policy period in this case; that is, between [1127-dj] November 1, 1947 and October 31, 1950, through the larceny, theft, embezzlement, misappropriation, wrongful abstraction, willful misapplication, or other dishonest or fraudulent act or acts of any employees of the plaintiff, acting alone or in collusion with others, it shall then be your duty to determine the amount of such loss. In establishing the amount of such loss, the plaintiff is not required to prove the same with preciseness or exactitude. There is no requirement in the insurance policy issued by the defendant to the plaintiff that if property be stolen from the plaintiff by any of its employees, that such property be identified as being taken on certain specific dates or as particular number of pieces of particular kinds of property, or otherwise specifically identified. It is sufficient under the policy for plaintiff to establish that property belonging to it was lost to it through the larceny, theft, misappropriation, wrongful abstraction, willful misapplication, or other dishonest or fraudulent act or acts of any of its employees acting alone or in collusion with others and to furnish a basis for determining the value and amount of such property from which you as jurors can make reasonable inferences so as to determine the amount of plaintiff's loss, even though the amount so determined by you is not exact but only approximate.

INSTRUCTION NO. 8 - In this case plaintiff is [1127-e] not claiming an inventory shortage. Plaintiff is

claiming that it sustained a loss through the larceny, theft, misappropriation, wrongful abstraction, willful misapplication, or other dishonest or fraudulent act or acts of a number of its employees. Under such circumstances, the portions of the policy in this case with respect to the proof required of inventory shortages are not applicable. Plaintiff is not required to prove conclusively that such claimed loss was through dishonesty of anyone or more of its employees, but it is sufficient that plaintiff's proof be by a mere preponderance of the evidence.

INSTRUCTION NO. 9 - It is the policy of the law that if the plaintiff has sustained damage, recovery shall not be denied because the amount of such damage is difficult to ascertain. If you find that plaintiff did suffer some loss covered by the policy in suit, it is your duty to determine the amount of plaintiff's loss, even if it is difficult to do so with certainty. In such case you should fix an amount even if the same be not exact, but only approximate, as you reasonably infer from the evidence available to you under the Court's instructions."

THE COURT: For convenience, I will number these instructions, beginning with 1 in the order they were handed to me. No. 1 is a long, two-page instruction and that I will give in substance in my own language. I will not read [1127-1] any of these verbatim in my charge. What I give, I will give in substance. No. 1 I will give in substance.

No. 2. I don't think is the correct or applicable statement and I will not give No. 2, that is the one with reference to the introduction of the statement given to Mr. Merica. I will not give it in substance. I don't think it is a correct statement. The plaintiff, or the defense counsel cross-examined the witness about the statement and read some questions to him which he admitted making. That

[128] I think, is sufficient for impeachment. Whether the jury determines it is impeachment or not, is a matter for them, which statement they will believe. But I don't believe that they were required to offer it in evidence as long as it had served its purpose to get his admission of questions which were asked.

MR. GOLDMAN: May I make a suggestion as to part of it? He didn't admit a certain question that was asked. He asked whether he made a statement and he said he didn't remember.

THE COURT: It only serves for contradictory statements where they were made and admitted. It has no other purpose.

No. 5, which refers to the fact that the plaintiff did not have a right to introduce certain statements, I will not give, for the reason that I don't think it is an issue. It is a negative sort of statement. The statements were not introduced. The questions were not raised. It was not proper for the plaintiff to introduce them. I don't see any point in telling the jury that. That is a negative approach.

No. 4, I will give in substance, except that I don't think that I will say that the verdict must be for the plaintiff. There is no admission in the pleadings in this case nor in open court there is evidence of admissions having been made which the defendant — or which the jury might [129] accept or not as it shows.

MR. GOLDMAN: I respectfully call your attention to the latest answer filed, in the third paragraph, admits that on September 11, 1950, plaintiff discovered one of its employees committing a dishonest act which caused a depreciation in and loss of meat products processed by plaintiff.

THE COURT: I haven't been furnished with a copy of that. May I see that?

MR. GOLDMAN: It was handed to me yesterday, or day before.

THE COURT: Sort of a left-handed admission. What is the explanation of counsel for defendant on that?

MR. SELVA: They found some hams on the 11th day of September, and there may be depreciation of the value of those products. In what amount we don't know. There is no evidence of that.

THE COURT: In some amount.

MR. SELVA: Oh, in some amount, sure.

THE COURT: All right. I will tell the jury that they must find some amount.

No. 5, counsel for defendant have anything to say on No. 5?

(Argument of counsel omitted.)

THE COURT: I will not give No. 5 for the reason [1130] it is a comment on the evidence rather than any statement of law. The burden of proof is on the plaintiff to show proper notice and proof of loss, and it is not necessary for the Court to charge the jury on the evidence.

No. 6, I will not give because I see no materiality with reference to that one.

No. 7, I will give in my own language, the substance of it.

No. 8, I will not give for the reason I expect to tell the jury before arguments, that I am taking away from the consideration of the jury the matter of attempting to determine any damages by virtue of inventory shortage. So there is no point in legal instructions confusing the jury about inventory shortage.

Does the defendant have any special charges? (After Mr. Selva hands special charges to the Court:) I will letter these consecutively beginning with A. The first one I will letter A.

The following are the Special Charges Requested by counsel for defendant.

SPECIAL CHARGE REQUESTED NO. A — Members of the Jury: If you must resort to guess and speculation to determine the issues in the case, then your verdict must be for defendant.

SPECIAL CHARGE REQUESTED NO. B — Members of the [1130-a] Jury: It was the duty of the plaintiff to file proof of loss pursuant to the terms of the policy issued by defendant and, if you find that proof of loss was not filed in accordance with the terms of the policy and defendant has not waived such requirement, then your verdict must be for defendant.

SPECIAL CHARGE REQUESTED NO. C — Members of the Jury: I charge you that the jury is not permitted to guess and speculate.

Plaintiff must prove by a preponderance of the evidence, first, that it did sustain a loss of hams, shoulders or bacon by reason of a dishonest act or acts on the part of James Jackson; second, what such dishonest act or acts consisted of; third, the date or dates of each such act; fourth, the kind and weight of each meat product lost by plaintiff because of each such act or acts and the reasonable value thereof to plaintiff.

SPECIAL CHARGE REQUESTED NO. D — Members of the Jury: I charge you that the Jury is not permitted to guess and speculate.

Plaintiff must prove by a preponderance of the evidence, first, that it did sustain a loss of hams, shoulders or bacon by reason of a dishonest act or acts on the part of Willie Early; second, what such dishonest act or acts consisted of; third, the date or dates of each such act; fourth, the kind and weight of each meat product lost by

plaintiff [1130-b] because of each such act or acts and the reasonable value thereof to plaintiff.

"SPECIAL CHARGE REQUESTED NO. E — Members of the Jury: I charge you that the jury is not permitted to guess and speculate.

"Plaintiff must prove by a preponderance of the evidence, first, that it did sustain a loss of hams, shoulders or bacon by reason of a dishonest act or acts on the part of Helen Hurt, second, what such dishonest act or acts consisted of, third, the date or dates of each such act, fourth, the kind and weight of each meat product lost by plaintiff because of each such act or acts and the reasonable value thereof to plaintiff.

"SPECIAL CHARGE REQUESTED NO. F — Members of the Jury: I charge you that the jury is not permitted to guess and speculate.

"Plaintiff must prove by a preponderance of the evidence, first, that it did sustain a loss of hams, shoulders or bacon by reason of a dishonest act or acts on the part of William Harris, second, what such dishonest act or acts consisted of, third, the date or dates of each such act, fourth, the kind and weight of each meat product lost by plaintiff because of each such act or acts and the reasonable value thereof to plaintiff.

"SPECIAL CHARGE REQUESTED NO. G — Members of the [1130-c] Jury: I charge you that the jury is not permitted to guess and speculate.

"Plaintiff must prove by a preponderance of the evidence, first, that it did sustain a loss of hams, shoulders or bacon by reason of a dishonest act or acts on the part of Robert Maiden, second, what such dishonest act or acts consisted of, third, the date or dates of each such act, fourth, the kind and weight of each meat product lost by

plaintiff because of each such act or acts and the reasonable value thereof to plaintiff."

THE COURT: As I indicated before, if it comes to the matter of damages, there will have to be some amount.

The second I will letter B, with reference to the proof of loss. I would like to hear defendants on that one. What do you have to say with reference to that?

(Argument of counsel omitted.)

THE COURT: I will give that substantially as it is. It is a question for the jury to determine, whether or [1131] not there was proof of loss.

The next one I will letter C. That one begins a series of five, all of which are the same. This one refers to Jackson; the next one I will letter D. That concerns Willie Early; the next one E. That concerns Helen Hurt. The next one F, that concerns William Harris. The next one G, that concerns Robert Maiden.

I will not give those verbatim because I believe they require more specific findings than are required of the plaintiff. I may say that I think the only testimony before the Court and jury is based on hams, shoulders and bacon, because that is what the witness, William Harris, says was what they took.

MR. GOLDMAN: I don't have copies here. I copied this in long hand for opposing counsel. I would like to offer another instruction. As your Honor was making the statement, I wrote another one out in longhand which I will have typed up.

THE COURT: I am not going to continue to take these. You had an opportunity to present them.

MR. GOLDMAN: Based on one of the instructions your Honor said you would give for the defendants.

THE COURT: The one you just handed me I will number No. 9 and I will not give it verbatim. I will try

to cover the subject of damages substantially as I think it [1132] should be.

MR. SELVA: Is the Court receiving this now?

THE COURT: No. 9 I have received, and say I will not give it verbatim. But I will try to give a proper statement on the matter of damages.

MR. GOLDMAN: Your Honor, may I make an application to the Court? Your Honor has stated that he would give in substance No. B as to the proof of loss. I would like your Honor, if you will not accept the informal one I have here, if your Honor would qualify that by stating in accordance with the Court of Appeals of this Circuit and the other Courts of Appeal that where the defendant has denied the claim on merits, it objecting to any notice of proof of loss, that any objections thereto are being waived. That is the exact holding of the court in many cases in the Courts of Appeal.

THE COURT: I will check that. If I find it necessary, I will make it a part of my instructions. I take it we have concluded this matter?

[illegible] I would like to qualify what I said with reference to instructions No. 1 in the light of what I said in connection with the instruction letter B. I would have requested No. 1 to the extent that if the jury found there was no proof of notice, the verdict would have to be for the defendant.

[illegible]

INSTRUCTIONS OF COURT BEFORE ARGUMENT

[1133] THE COURT: Ladies and gentlemen of the jury, I believe I told you at the beginning of this trial that it was the duty of the Judge to determine questions of fact, and that it was the duty of the Judge to determine questions of law. You, the jury, have been considering questions

of law, and the Court arrived at these legal conclusions or at these conclusions.

First, that in your consideration of this case and endeavoring to arrive at a conclusion, you are not to consider the evidence of an inventory shortage.

[1137] I realize we have been here a number of days hearing evidence on the question of inventory shortage and it is necessary that the Court hear all the evidence. Then it becomes necessary for the Court to determine as a matter of law whether that presents a factual question which may be considered by the jury.

So, the Court has determined, as I say, that in arriving at your verdict, you will not consider this evidence of inventory shortage. In other words, it cannot be used by you as any measure of determining any loss to the plaintiff.

The second thing that I withdraw from your consideration is a claim in the plaintiff's second amended complaint of an item of damages referred to as "loss sustained by dishonesty of unidentifiable employees." In the policy of insurance, which is the subject of this action, there is a provision that, under certain circumstances plaintiff may have a right to recover a loss sustained by theft or otherwise by employees who are not specifically identified. That claim is in the complaint, and that I withdraw from your consideration.

I will give you further instructions later. And I might say to you at this time, primarily, the case will be submitted to you for your determination on the facts upon the testimony of William Harris.

The attorneys will undoubtedly make this clear in their argument as they present the argument to you. And I [1138] think also that it might be fair to state to you at this time, that when you retire to your jury room for the

consideration of the case, it will be upon what we call a special finding of facts. In other words, you will be asked to make findings upon various facts at issue in the case and not to return a general verdict.

At this time, counsel —

MR. SELVA: May it please the Court, in view of the defendant's present position, we respectfully request a realignment of the exhibits and respectfully request an order requiring plaintiff at this time to produce original statements of Helen Hurt, James Maiden, William Hart, James Jackson and Willie Early, for submission to the jury.

THE COURT: That motion will be overruled. It is correct that only those exhibits which will be pertinent to the issue now before the jury should be submitted to the jury, if you can ascertain this before the case goes to the jury.

. . . .

Excerpts from the argument of Mr. Pickrel, Counsel for Defendant.

[1169] So maybe these people made a mistake when they signed this paper, but they signed it, and here is one of the things that Sucher Packing Company is expected to do, if they want to collect, and I think you will agree it is reasonable. As soon as practicable but in any event not later than fifteen days after discovery by the Assured of any loss or any occurrence which may give rise to a claim, the Assured shall give the Company written notice thereof, at its Home Office in Philadelphia, Pa., and within four months after such discovery shall file with the Company affirmative itemized proof of loss, duly sworn to, including the instrument which is the basis

MR. GOLDMAN: I object. It is not proper argument.

THE COURT: I will overrule the objection.

MR. PICKREL: Now, I think that is certainly reasonable. You can't expect an insurance company to pay a claim unless there has been a proof of claim filed.

* * *

[1172] That is enough to defeat the claim and you can find for the defendant on either one of those counts that there is no proof of claim or there was no exhibition of those papers that Mr. Sachs required, and that is a sound verdict.

MR. GOLDMAN: Objection.

THE COURT: Overruled.

MR. PICKREL: Now, we say this to you. There was no proof of claim filed on the matter before you today. You know that better than I do.

* * *

[1176] You will also find in the papers — I am sure it will be among the papers, although they are going to put the eliminator on a lot of these exhibits — you will find the court record of the indictment of William Harris and James Jackson, and you will also find that any indictment returned against Robert Marden was dismissed, nothing ever done about it.

MR. GOLDMAN: We object. That is not in evidence, your Honor.

THE COURT: I think that is not in evidence.

MR. PICKREL: Well, it is over there some place, in that basket of papers that Robert Marden's indictment was dismissed.

MR. GOLDMAN: I object.

THE COURT: I think the Court excluded that evidence.

MR. PICKREL: I don't know how you could. The other is in.

Excerpt from closing argument of Counsel for Plaintiff

[1186] They haven't offered this statement in evidence to prove Harris wasn't telling the truth and as for them saying we should offer statements on these other employees they know we can't do that, we are not allowed.

MR. SELVA: If the Court, please, that is not a correct statement, that they are not allowed to do it. We have no reason and no objection to offering of these statements to the jury.

MR. GOLDMAN: Your Honor –

MR. SELVA: Go ahead and put them in.

MR. GOLDMAN: The case is closed.

MR. SELVA: Oh, sure.

THE COURT: May I say again that if argument be based on the evidence that is in the record and argument whichever side it comes from about evidence that is not put in the record and any blame attached to one side or the other for not putting it in the record, I think is not a matter of proper argument, or argument upon the evidence that is in the record, and the jury, as I said before, I believe will have intelligence enough to sort out the evidence that has been given from the witness stand and which the Court allowed. Now will you proceed briefly with the argument.

MR. GOLDMAN: May I say, your Honor, that the reason for the statement was in response to Mr. Selva's [1187] statement.

THE COURT: I am not interested in the reason for it.

Charge of the Court

(1191) THE COURT: Ladies and Gentlemen of the jury, I think I stated to you yesterday that the issues which you will have to find in this case are to a large extent involved in the testimony, or contained in the testimony of William Harris. I don't know of any precedent for what I am going to do now, or any legal authority for it, but it has been nearly three weeks since Mr. Harris testified. Yesterday, during the arguments of counsel, they read various portions of Mr. Harris' testimony, at different times, different parts of it. So, I think in fairness to you, in order that you may be better able to understand the case and the charge and the work that you will have to do, I am going to ask Miss Fischer, the court reporter, to read Mr. Harris' testimony in its entirety, both direct and cross-examination.

(Thereupon William Harris' testimony was read by the reporter.)

THE COURT: As I have said, your duties as jurors are to determine questions of fact, and the duties of the judge are to determine questions of law.

(1196) Now, may I explain to you what we mean by evidence, first by stating what was not evidence. The opening statements that the lawyers made here to you at the beginning of the trial, their arguments at the close of the trial, their statements that they have made in court during the progress of the trial, and any of the statements that I have made during the progress of the trial, are not evidence. That is the duty of the lawyers in the trial of a case to make objections to the admission of testimony, it is to consider, according to the rules of evidence, that testimony is not proper, and you will draw no inferences from any questions that were asked, if objections were

made and the objections sustained. You will not draw any inference from the question itself or speculate on what the answer might have been.

Then, from time to time, during the progress of the trial, the Judge orders certain statements stricken out or stricken from the record. They may be statement of counsel, they may be statements of witnesses. So, when the Court orders a statement to be stricken from the record that means you are to disregard that and completely put it out of your mind. You are not to consider them in any way.

I have stated to you heretofore that you are to disregard evidence pertaining to inventory shortage. So I will say again now that in arriving at your verdict, you will not consider the matter of the evidence concerning the [1190] matter and its defense to the claim made by the plaintiff.

These papers, the Second Amended Complaint, and the Answer are known as pleadings and you will have them with you in your jury room. They are not evidence. You may use them to refresh your recollection as to the issues in the case and where there are admissions contained in the Answer, you may consider those admissions as being true without any further testimony on them.

The plaintiff's complaint is based upon a policy of insurance issued by the defendant to the plaintiff. This policy has been offered in evidence as an exhibit and will go with you in your jury room. It is not the actual policy but it is agreed by counsel it is an accurate and exact copy of the policy between the parties.

One of the things that this policy insures is: Employee Dishonesty Coverage. Through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wilful misapplication or other dishonest or fraudulent acts or acts committed anywhere by any of the Employees act

ng alone or in collusion with others, including loss of Money and securities and other property through any such acts or acts of any of the Employees."

Now, I have stated to you and had read to you Mr. Harris' testimony, and stated that in his testimony was contained substantially the matters pertaining to theft that [1197] will be before you. You must consider all of the evidence in the case that I have allowed to go to you and that I have not withdrawn from your consideration.

One of the important questions that arises in this case refers to the matter of time. First, before I get to that, may I make this comment with reference to William Harris as a witness. As has been brought out in the evidence, and it is undisputed, William Harris was convicted of grand larceny. In the early history of our law, a person who had been convicted of a felony, and grand larceny is a felony, was disqualified to testify as a witness, for the reason it was considered that the person was guilty of a felony, his word was not capable of belief. But now by statute, particularly in Ohio, a person is not disqualified as a witness. He may testify and the question of credibility, how far you may want to believe him or whether or not his conviction has any effect upon his credibility is purely a question for you, yourself, to consider.

As I started to say a moment ago, one of the essentially important questions in this case is the matter of the time of employment of William Harris. When was he employed? How long did he work for the plaintiff?

There is evidence that Helen Hurt, Robert Marden and James Jackson were employed by the plaintiff before 1948. Plaintiff has employment records to this effect. Plaintiff [1198] has an employment card to the effect that Willie Early was employed July [illegible]. William Harris, according to the record evidence, was employed regularly July

26, 1950, and there is a card showing that he worked three days, beginning April 26, 1950. Mr. Harris, you will recall, said he worked off and on before his regular employment. Mr. McConkey said he was there. That is, Harris was there when he came to the plaintiff's place in September, 1949.

The burden is on the plaintiff to prove the time of employment by a preponderance of the evidence. In this connection, you have a right to consider the testimony that the plaintiff destroyed employment records in 1953, while this suit was pending.

If the plaintiff fails to prove by a preponderance of the evidence the employment of William Harris, other than what is shown by records, then this case must fail to that extent. You cannot consider any thefts of anyone during the time that William Harris was not working for the plaintiff. The only testimony you have of any thefts is from William Harris. Obviously, if he wasn't working, he couldn't steal anything and wouldn't know what anyone else did.

You have a right to consider the plaintiff's place was guarded by detectives during the period in question, that they, the detectives, never discovered any thefts.

While James Jackson and William Harris were [1199] prosecuted, the evidence is silent about Helen Hurt, Willie Early and Robert Maiden, except what William Harris says about them. If you observe the testimony, you will note that the only time William Harris mentioned Maiden, Hurt or Early in his direct examination, was when Mr. Goldman used their names in his questions. Mr. Harris said they were involved with him. Involved, with reference to a statement of that kind, is a conclusion, that is involved with him. It is an unsatisfactory sort of evidence. It doesn't have much meaning.

On cross-examination, William Harris was confronted with a statement he had made to Mr. Merica, the detective at the time of his arrest. It is proper for the purpose of testing his veracity. He admitted that in that statement he had answered a statement to Mr. Merica that Jimmy Jackson got him to stealing hams about three weeks before his arrest. He explained this by saying that he meant he had been hauling three weeks.

You are the judge of the credibility of the witness, and it is up to you to determine how much reliance to place on his testimony.

Yesterday, in the arguments of counsel, Mr. Pickrel argued about proof of loss. Now, the matter of the proof of loss based upon certain facts becomes a question of law for the Court to consider. You will only make a determination [1200] as to what was taken, what the facts were in connection with making a proof of loss.

Now I have prepared for you a document entitled "Special Verdict". It may seem long and it may seem complicated, but I think if you will take it step by step and attempt to pass upon the questions that are submitted, you will not find it too difficult. This is the means by which you make findings of fact and report the facts to the Court.

You are not limited to what is submitted here. If you find that other facts are important that you wish to make a finding on, considering the issues in the case, you may make additional findings that are not indicated in this document.

Now, this document is part narrative and part made up of interrogatories, of questions which you will be called upon to answer.

The first part of it here is in narrative form and I think perhaps you will find things there the evidence is not dis-

puted on. However, if you find there is any fact stated here that you cannot find by a preponderance of the evidence you should strike it out.

I will read this first part. "That the plaintiff, the Sucher Packing Company, and the defendant, Manufacturers Casualty Insurance Company, are corporations and were such at [1201] all times alleged in the second amended complaint.

"2. That on December 30, 1947, the defendant issued an insurance policy to plaintiff, for which the plaintiff paid a premium, a true copy of said policy being plaintiff's exhibit No. 9 admitted into evidence;

"3. That the plaintiff notified John I. Macbeth, agent of the defendant, by telephone on or about September 12, 1950, that it had sustained a loss;

"4. That the plaintiff prepared a paper entitled proof of loss which is plaintiff's exhibit No. 11-A, admitted into evidence, and that said proof of loss was received in the mail by the defendant company at its home office on or about January 5, 1951;

"5. That on September 11, 1950, William Harris and James Jackson were apprehended at the plaintiff's plant in an alleged act of larceny, and as a result thereof, each was subsequently convicted of grand larceny;

"6. That the defendant admitted by plaintiff's exhibits Nos. 17 and 20, admitted in evidence, that plaintiff sustained a loss in the amount of $291.14;

"8. That Helen Hurt, Robert Maiden and James Jackson were employed by the plaintiff on or before November 25, 1948."

[1202] And then there follows five subdivisions each subdivision headed by the name of one of these five employees. First is William Harris and there is a statement here. "That William Harris was regularly employed by the plaintiff on or about July 26, 1950." You will recall

there is an employment card on that. If you don't believe that is sustained by the burden of proof, by the preponderance of the evidence, you need not accept it.

Then follows a question. Was William Harris employed by the plaintiff at any time prior to the above date? If so, give date or dates of previous employment.

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of William Harris? The testimony of William Harris shows that only hams, shoulders and bacon were taken, so, if you find that to be true, you will accept that fact that only hams, shoulders and bacons were involved.

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of William Harris?

If you find William Harris committed any dishonest act or acts in violation of the terms of the policy of insurance which is the subject of this action, you will make a finding of the facts upon the following things in relation thereto.

May I explain, you will answer the previous question. [203] If you answer that in the affirmative, then you would be required to go on and answer the following matters with reference to that. If you should answer that question "No" then there would be no application of the succeeding questions. But here are the further findings that you would be asked to make, if you answer the first question "Yes."

1. The date or the time during which such dishonest act or acts occurred.

2. The nature of the dishonest act or acts.

3. The number of hams, shoulders or bacon taken, if you find any were taken.

4. The approximate weight in pounds of each item.

"5. Were any such dishonest act or acts committed by William Harris alone, or in collusion with any of the following-named employees: James Jackson; Willie Early; Helen Hurt or Robert Maiden?

"6. If they were committed in collusion with any of the above-named persons, give the names of such person or persons."

Now, there follows a heading here "Strike out either 7 or 8 or both of them if not applicable" and I will read 7 or 8 in a moment.

I will explain to you a little more fully later the burden of proof is upon the plaintiff to prove the [1204] elements of its case by a preponderance of the evidence. And if the defendant fails to prove any of the items which it is required to prove by a preponderance of the evidence, then your finding must be for the defendant.

MR. PICKREL: Pardon me. You said "If the defendant fails to prove".

THE COURT: Thank you. I am sorry. If the plaintiff fails to prove any item of its case by the preponderance of the evidence which it is required to prove, then the plaintiff would fail on that particular issue and you would have to find for the defendant. So, I have stated 7 and 8 here:

"7. We find that there is insufficient evidence to make a finding by preponderance of the evidence that William Harris committed any dishonest act or acts.

"8. We find that there is insufficient evidence to make a finding by preponderance of the evidence as to the number or approximate number of pounds of hams, shoulders or bacons taken by William Harris."

Now, I say, if you follow this carefully you will ascertain whether 7 or 8 are applicable and whether they should be left in or whether they should be stricken out.

You will understand that you, the jurors, are making the

findings here. It is necessary that all twelve of your number agree upon every fact found, on every question [1205] and answer, on every fact found.

Now, I have gone through the interrogatories concerning William Harris. Then follows James Jackson, the same queries, the same questions; Robert Maiden, same questions, same 7 and 8 to be accepted or rejected, in accordance with the facts as you find them.

Now we come in the same way to Willie Early. Willie Early is prefaced with the statement: "We find that Willie Early was employed by the plaintiff on or about July 3, 1950." I think it is undisputed, but if you do not find that is true by a preponderance of the evidence, you will disregard it.

Now it comes to a place where you are required to find number of pounds of items of meat taken. If you find dishonest acts and meat was taken, you are asked to state the amount. If you come to that point at any place, I will instruct you in this way with reference to that: You should not guess at an amount; you should not speculate, really pick some figure out of the air. But, on the other hand, you are not required to find it with perfect exactitude or with precise mathematical calculation. But there must be some basis for your computation which will reasonably afford you an opportunity to arrive at some figure that approximates correctness.

Now there is another interrogatory here following [1206] the five names: "Do you find that the plaintiff withheld from the defendant papers, books, vouchers or any records bearing in any way upon the claim made in this case, for which the defendant made a request? If so, what was withheld?"

Another interrogatory: "If you find that the plaintiff sustained any loss due to the dishonesty of any of the

above-named five employees, list the total amount taken by all employees, of each item in pounds." And then there are blanks to list hams, shoulders and bacon, total amount taken.

Then there follows a blank page on which you may make any other findings you deem necessary or change anything that indicates a finding in this form.

And then there follows 12 lines for signatures.

Now, as I have indicated, the burden of proof is upon the plaintiff to make out each and every essential element of its claim by a preponderance of the evidence. By a preponderance of the evidence, we mean the weight of the evidence. By the weight of the evidence we mean that evidence which outweighs or overbalances in your minds the evidence opposed to it.

If you find that the evidence favorable to the defendant's claim equals or exceeds that which is favorable to the plaintiff's claims, the defendant must prevail as the [1207] plaintiff has thus failed to sustain the burden of proof.

You should not be swayed or influenced by any feeling of sympathy or prejudice. It is your duty to carefully reflect upon all of the evidence before you and make your finding in accordance.

Let your only effort be to arrive at a just and fair verdict between the parties.

If you consider anything that the Court says in this charge as an expression of opinion on any disputed question of facts, you may disregard it, because you are the sole judges of the facts, the weight of the evidence and the credibility of the witnesses. It is peculiarly in the province of the jury to judge of the credibility of the witnesses. That is to say, the extent to which they should be believed and the importance and weight to be given to their testimony. You may believe all of any witness' testimony, or you may dis-

believe all of it; or you may believe it in part and disbelieve it in part.

In considering the testimony of a witness, you should take into consideration his interest, if any, in the outcome of the case; his affiliation, if any, with either of the parties, and any bias or prejudice which he might naturally be expected to have as the result of such interest or affiliation. But such interest or affiliation is not at all conclusive against accepting his testimony. Those are [1208] simply facts which should be considered in weighing.

Likewise, you should consider the demeanor of a witness upon the stand, whether his testimony as a whole is consistent or conflicting in some of its parts. Whether or not there is anything in his manner of testifying that would indicate such prejudice or bias as might induce him to color his testimony or exaggerate facts in favor of or against either party to the suit. And every other attendant fact or circumstance upon which you might reasonably base a conclusion as to the credibility of his testimony.

You are not obliged to accept as true testimony of any witness or witnesses, if in your opinion, judging from common observation, it may be mistaken, untrue or unreliable.

Now, when you retire to your jury room, you will first select a foreman and then as I previously said, it is necessary that your verdict be unanimous. That means it must be unanimous upon each and every fact found by you, each and every answer that you make.

I don't know if I made it clear. I think you understand that your answers to questions are to be written on the document. I think there is enough room for you to write that.

Now, if you will remain in your seats just for a few moments, I will consult with counsel in chambers.

[1209] (Court and counsel retired to chambers and the following proceedings were had out of the presence and hearing of the jury):

THE COURT: I will hear counsel for plaintiff first.

MR. GOLDMAN: I would like to and do request that first, before making the request, object to the form of the special verdict. I believe the special verdict in its form places a burden on the jury of finding with exactness more than it is required by law.

I further request that the special verdict permit the jury to find values of property taken.

I also believe that the form of the special verdict de-emphasizes the right of the plaintiff to recover for dishonest acts of individual employees in collusion with others, even when not acting alone and requires a greater degree of particularity with respect to the dishonest acts to be found or required by the policy.

I also feel that the form of the questions and the manner in which the special verdict is arranged is apt to make it easier for the jury to find the facts against the interests of the plaintiff. Insofar as the form of the special verdict, I am making that very respectfully, but I wish to have it in the record, that is the way I feel about the special verdict.

And as to the Court's charge, I believe that the [1210] Courts comments on the evidence were such as to disparage the testimony of William Harris unduly.

Also take exception at this time to the exclusion of the matter of the book figures which was the result of your Honor's earlier decision; in your instructions it was repeated, they were not to be considered in describing the inventory shortage evidence.

I think also your Honor's comments in regard to the fact that the record was silent about what happened to Maiden, Hurt and Jackson will create an inference against

the interests of the plaintiff, which is not necessarily so. Whether they were convicted or not doesn't make any difference. They may be just as guilty. Many criminals loose that haven't been brought to trial.

And your Honor's reference to Harris employment, while you referred to his regular employment beginning date in July and the interrogatory referred to whether he was employed before that date, and I feel your Honor should have referred to regular — your Honor should have put the query whether he was employed on a part-time or irregular basis. The jury may be under the impression in the form the matter is put to them that his employment prior to the July date would have to be of the same character as it was subsequent to that date.

Also, in the form of the special verdict there is [1211] no place for a finding that the defendant acknowledged the claim was valid ~~in~~ part and denied the balance of the plaintiff's claim without making any objection or taking any exception to the manner, form or time of the filing of notice or proof of loss.

Further, I request that the Court add to its charges that the jury has the right but is not required to infer from the failure of the witness Jackson to answer questions propounded to him that he could not truthfully answer such questions without incriminating himself.

Also request the Court to delete from the form of the special verdict the reference to any failure on the part of the plaintiff to supply any papers or other records on the request of the defendant, for the reason that there is no evidence, even if you take Mr. Sach's statement, which is the only evidence of any possible figures, to furnish documents requested by the plaintiff, that is in August 1954 long after suit has been filed, long after the defendant filed their answer, making whatever denials it wished. So, I

think that the interrogatory, first, should not be put, because there is no evidence to justify the jury saying that it had a bearing on the matter; secondly, that if put, the time should be fixed.

Also like to request that the Court add to its instruction that the failure — that from the failure of the [1212] defendant to offer in evidence to identify the statement of William Harris, that the jury is entitled to, but not required to, infer from that failure that such statement did not in particular, other than Harris admitted was in the statement, contradict Harris' testimony or that it was to the defendant's interest not to introduce the statement in evidence.

Also request that the Court add the instruction that the jury cannot infer, — make any inference that any other statements taken by Merica from other employees were in any way unfavorable to the claims of the plaintiff by reason of the fact — from the fact that the plaintiff did not offer them in evidence on the ground that the plaintiff did not have the right to introduce them in evidence.

I also think the interrogatories should make a finding that the plaintiff did suffer some loss, if that is admitted in the answer. The special verdict should make a finding that the plaintiff did suffer some loss because that is admitted in the answer.

Further, I ask the Court to amplify its charge on the burden of proof as to the amount, the statement that if loss has been established and only the amounts thereof is uncertain, that such uncertainty alone is not ground for the jury not fixing some amount, even though approximate, if there is any reasonable basis on which the jury can do so. [1213] I know your Honor did make a charge on that subject, but I don't feel the charge went as far as it should have

to protect the interests of the plaintiff, particularly in view of the form of the special verdict.

I think I have said enough.

THE COURT: Without attempting to go into each item here for the record and answering it, I have noted my decision as I went along, with reference to the points you raised, and it is the decision of the Court that it will not delete anything from the charge or the special verdict, nor will it amplify its instructions.

Several objections you raise with reference to the special verdict are not applicable at all, for the reason, for instance it is clearly stated in here $291. loss. They could hardly return this without finding $291., unless they deliberately strike it out. And so with a number of things. I tried to frame the questions with reference to these individual employees in such a way that I did not impose a specific burden as to an absolute date, exact number of pounds taken, but I can hardly see how anyone could arrive at a final conclusion of judgment without having found upon each of the issues raised by the questions about those employees. So, I will overrule the request made by counsel for plaintiff.

Now, do counsel for the defendant have anything?

[1214] MR. SELVA: My only suggestion, if the Court please, might be the reading of that portion of the policy which required the plaintiff to make available upon request of the defendant. The Court did read the first part of the coverage. Unless the Court might feel reading it at this time might place undue emphasis on it and in that case we have no request.

THE COURT: What the jury is doing is making a finding of facts, what we want to know is whether or not they refuse anything. If they say they do, then the Court determines the matter of law.

MR. SELVA: I have nothing further to suggest to the Court.

MR. GOLDMAN: May I also request at this time that there be submitted to the jury in evidence the figures as to the sales price? I made that request not on the record before.

(Off the record).

MR. SELVA: Note our exceptions to the charge and the special verdict.

(COURT AND COUNSEL RETURNED TO THE COURT ROOM WHERE FOLLOWING PROCEEDINGS WERE HAD IN THE HEARING AND PRESENCE OF THE JURY.)

THE COURT: All right. Members of the jury, the case is now submitted to you for your deliberations. It [1215] is 11:30. I am not aiming to in any way hurry you at your arriving at your conclusion. In due and proper time, if you haven't arrived at a verdict, the Court will permit you to go to lunch.

Plaintiff's Exhibit 5-A

THE STATE OF OHIO, MONTGOMERY COUNTY

FILED: Nov. 21, 1950.

THE COURT OF COMMON PLEAS

Terms in the year Nineteen Hundred and Fifty

MONTGOMERY COUNTY, ss.

THE GRAND JURORS *of the County of Montgomery, in the name, and by authority of the State of Ohio, on their oaths do present and find that*

RECEIVED
SHERIFF'S OFFICE
Nov. 21, 11:38 AM 1950
Montgomer County,
Ohio.

William Harris and James Jackson

on or about the Eleventh *day of* September *in the year one thousand nine hundred and* Fifty *in the County of Montgomery, aforesaid*, and State of Ohio, did steal from The Sucher Packing Company, a quanity of beef, pork and hams, in an amount and value in excess of Thirty-five ($35.00) Dollars; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

on or about the Eleventh *day of* September *in the year*

one thousand nine hundred and Fifty *in the*

County of Montgomery, aforesaid, and State of Ohio, did steal from The Sucher Packing Company, a quanity of beef, pork and hams, in an amount and value in excess of Thirty-five ($35.00) Dollars; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

MATHIAS H. HECK /s/
Prosecuting ATtorney of
Montgomery County, Ohio.

I hereby certify this to be a true and correct copy.
Witness my hand and seal this 11th day of [illegible] *1954*

A. O. PAUL, CLERK
Clerk of Common Pleas
Court of Montgomery County, Ohio
By [signature]
Deputy

COPY

No. 17293

THE STATE OF OHIO, MONTGOMERY COUNTY
COURT OF COMMON PLEAS

September Term, 19 50

The State of Ohio

vs.

William Harris and

James Jackson

INDICTMENT FOR

Grand Larceny

A TRUE BILL

Harry L. Smith
Foreman of the Grand Jury

Prosecuting Witness

Plea

Filed, 19

~~Filed;~~ Nov. 21, 1950
Clerk

MATHIAS H. HECK
Prosecuting Att'y Montgomery County

On the 21 day of Nov. 1950, I served a duly certified copy of the within indictment, by handing same to James Jackson, defendant

Fees $ 2.10

BEN H. SMITH Sheriff.
By: O. McClain Deputy

RECEIVED
SHERIFF'S OFFICE
NOV. 21 12:43 PM 1950
Montgomery County,
Ohio.

TO THE SHERIFF:

I hereby certify the within to be a true copy of the original indictment on file in this office.

G. O. Paul *Clerk*

Plaintiff's Exhibit 5-B

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
FILED: :DEC. 1, 1950

STATE OF OHIO, :

Plaintiff, : CASE NO. 17293

-vs- :

JAMES JACKSON :

Defendant. : E N T R Y

:

* * * * * * * * * * * *

On this 1 day of December, 19 50, the defendant, James Jackson came before the Court with his counsel and withdrew his plea of not-guilty and entered a plea of guilty to Grand Larceny, as he was charged in the indictment; which plea was accepted by the Court.

WHEREUPON, the Court referred the defendant to the Probation Department for investigation and report before final disposition.

CRAWFORD /s/
JUDGE

MATHIAS H. HECK,
Prosecuting Attorney

_____
and withdrew his plea of not-guilty and entered a plea of guilty to Grand Larceny, as he was charged in the indictment; which plea was accepted by the Court.

WHEREUPON, the Court referred the defendant to the Probation Department for investigation and report before final disposition.

CRAWFORD /s/
JUDGE

MATHIAS H. HECK,
Prosecuting Attorney

By: RUSSELL L. CARTER /s/
Russell L. Carter.
Assistant.

I hereby certify this to be a true and correct copy.
Witness my hand and seal this 30th day of January 1941
A. O. PAUL, CLERK
Clerk of Common Pleas
Court of Montgomery County, Ohio
By A. O. Paul
Deputy

POLICY No. 69499

Manufacturers Casualty Insurance Company

PHILADELPHIA, PA.

Comprehensive Dishonesty, Disappearance and Destruction Policy

(Revision of 3/12/45)

The Manufacturers Casualty Insurance Company (herein called Company), in consideration of the payment of an agreed premium, and subject to the Limits of Liability, General Agreements, conditions and other terms of this Policy, does hereby agree with The Sucher Packing Company

(hereinafter called the Assured)

whose principal address is 400 North Western Avenue, Dayton, Ohio

To Indemnify the Assured for all loss sustained during the policy period which shall begin with the 1st day of November 19 47 ;

In Accordance with such and so many of the Insuring Agreements hereof as are specifically designated by the insertion of an amount of insurance in the table of Limits of Liability:

Limits of Liability

Insuring Agreement I, Option A	$ Nil
Insuring Agreement I, Option B	$ 20,000.00
Insuring Agreement II	$ 10,000.00
Insuring Agreement III	$ 10,000.00
Insuring Agreement IV	$ Nil
Name of Depository:	
Address:	
Insuring Agreement V	$ 25,000.00

INSURING AGREEMENTS

Employee Dishonesty Coverage

I. Through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wilful misapplication or other dishonest or fraudulent act or acts, committed anywhere by any of the Employees acting alone or in collusion with others, including loss of Money and Securities and other property through any such act or acts of any of the Employees, and that part of any inventory shortage which the Assured shall conclusively prove to have been caused by dishonesty or fraud on the part of any of the Employees; provided that if there is designated in the Limits of Liability an amount against

Option A—(Primary Commercial Blanket Bond Coverage)

then such amount shall be the Company's aggregate liability under this Insuring Agreement I as to all Employees

I. Through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wilful misapplication or other dishonest or fraudulent act or acts, committed anywhere by any of the Employees acting alone or in collusion with others, including loss of Money and Securities and other property through any such act or acts of any of the Employees, and that part of any inventory shortage which the Assured shall conclusively prove to have been caused by dishonesty or fraud on the part of any of the Employees; provided that if there is designated in the Limits of Liability an amount against

Option A—(Primary Commercial Blanket Bond Coverage)

then such amount shall be the Company's aggregate liability under this Insuring Agreement I as to all Employees in accordance with the restoration provisions of Paragraph 9;

Or, if there is designated in the Limits of Liability an amount against

Option B—(Blanket Position Bond Coverage)

then such amount shall be the amount of the Company's liability under this Insuring Agreement I as to each Employee.

Loss Caused by Unidentifiable Employees

If a loss is alleged to have been caused by the dishonesty or fraud of any one or more of the Employees, and the Assured shall be unable to designate the specific Employee or Employees causing such loss, the Assured shall nevertheless have the benefit of this Insuring Agreement, provided that the evidence submitted reasonably (in case of inventory shortage, conclusively) establishes that the loss was in fact due to the dishonesty or fraud of one or more of the said Employees, and provided further that the aggregate liability of the Company for any such loss shall not exceed the amount set forth in the Limits of Liability against the applicable Option.

Coverage Within Premises

II. (A) Of Money and Securities occurring within any of the Premises and caused by the actual destruction, disappearance or wrongful abstraction thereof; and

(B) Of other property or damage thereto (except by fire) caused by Robbery or Safe Burglary within any of the Premises, or attempt thereat, and damage (except by fire) to a locked cash register, cash drawer or cash box in the Premises caused by a felonious entry into such container, or attempt thereat; and for all damage (except by fire) to the Premises caused by Robbery or Safe Burglary or by burglarious entry into the Premises, or attempt thereat.

Insuring Agreement II shall not apply to loss, damage or destruction caused or contributed to by (1) forgery by whomsoever committed, or (2) any dishonest, fraudulent or criminal act, other than Robbery or Safe Burglary or attempt thereat, committed by any Employee, director or trustee of the Assured, whether acting alone or in collusion with others, or (3) the giving or surrendering of any Money or Securities in any exchange or purchase.

Coverage Outside Premises

III. (A) Of Money and Securities occurring outside the Premises and caused by the actual destruction, disappearance or wrongful abstraction thereof while being conveyed by a Messenger; and

(B) Of other property or damage thereto, caused by Robbery or attempt thereat outside the premises while such property is being conveyed by a Messenger.

Insuring Agreement III shall not apply to loss, damage or destruction caused or contributed to by (1) forgery by whomsoever committed, or (2) any dishonest, fraudulent or criminal act, other than Robbery or attempt thereat, committed by any Employee, director or trustee of the Assured, whether acting alone or in collusion with others, or (3) the giving or surrendering of any Money or Securities in any exchange or purchase.

Safe Deposit Box Coverage

IV. Of Securities caused by the actual destruction, disappearance or wrongful abstraction thereof from within a leased safe deposit box or boxes in any burglarproof vault in the Premises of the Depository designated herein or

from within the said Premises of the Depository while the Securities are temporarily outside the safe deposit box or boxes, excluding all loss caused or contributed to by (1) any dishonest, fraudulent or criminal act of any Employee, director, trustee or authorized representative of the Assured, whether acting alone or in collusion with others, or (2) the giving or surrendering of any Securities in any exchange or purchase.

Depositors Forgery Coverage

V. For its own account or for the account of any bank or banks in which the Assured has a checking or savings account, as their respective interests may appear, caused by forgery or alteration of, on or in any check, draft, bill of exchange, promissory note, or similar written promise, order or direction to pay a sum certain in money, made or drawn by, or drawn upon or as a direction to the Assured, or made or drawn by one acting as agent of the Assured, or purporting to have been made or drawn as hereinbefore set forth, including (a) any check or draft made or drawn in the name of the Assured, payable to a fictitious payee and endorsed in the name of such fictitious payee, (b) any check or draft procured in a face to face transaction with the Assured or with one acting as agent of the Assured by anyone impersonating another and made or drawn payable to the one so impersonated and endorsed by any one other than the one impersonated, and (c) any payroll check, payroll draft or payroll order made or drawn by the Assured, payable to bearer as well as to a named payee and endorsed by any one other than the named payee without authority from such payee, whether or not any endorsement mentioned in subdivision (a), (b) or (c) of this Insuring Agreement V be a forgery within the law of the place controlling the construction thereof; but excluding all loss caused by forgery or alteration of, on or in registered or coupon obligations issued or purporting to have been issued by the Assured, or any coupon attached thereto or detached therefrom, or Travelers Checks in whatsoever form drawn.

Mechanically reproduced facsimile signatures are treated the same as handwritten signatures.

Any loss or losses sustained by the Assured under this Insuring Agreement V shall be entitled to priority of payment over losses sustained by any bank aforesaid. In the event of claim hereunder by the Assured for the account of any bank or banks, the Company may adjust such claim either with the Assured or with such bank or banks, and payment of such claim to such bank or banks shall constitute full satisfaction of such claim by the Assured; but cases where the bank shall have already fully reimbursed the Assured for loss sustained shall be adjusted directly with the bank. The Company's total liability for losses under this Insuring Agreement V by whomsoever sustained shall be the limit of liability applicable to this Insuring Agreement V, subject to the provisions of Paragraph 9.

This Insuring Agreement V shall cover any loss or losses sustained by the Assured or any predecessor in interest of the Assured prior to its effective date but discovered thereafter within the time limit specified in General Agreement C, if such loss or losses would have been recoverable had this Insuring Agreement V been in effect at the time such loss or losses were sustained, subject to the following conditions all of which shall be conditions precedent to recovery as aforesaid:

(a) That the Assured or such predecessor carried Insuring Agreement V or some form of Forgery Bond or Policy of Forgery insurance (other than Fidelity insurance or suretyship) on the specific Office sustaining the loss, and

(b) That such other Forgery insurance was carried continuously from the time such loss was sustained to the effective date of this Insuring Agreement V, and

(c) That at the time of discovery of such loss the period of discovery of loss under all such prior Forgery insurance had expired, and

(d) That if the amount of insurance carried under this Insuring Agreement V is more or less than the amount of insurance carried under such prior Forgery insurance then the liability of the Company shall not exceed the smaller amount.

If the time for discovery of loss under any other terminated, canceled or expired bond or policy of Forgery insurance issued by the Company has not expired at the time Insuring Agreement V becomes effective, then liability under this Policy shall not be cumulative in amounts with liability under such other Forgery bonds or policies and shall not exceed in the aggregate, in any event, the larger or largest amount.

(c) That at the time of discovery of such loss the period of discovery of loss under all such prior Forgery insurance had expired, and

(d) That if the amount of insurance carried under this Insuring Agreement V is more or less than the amount of insurance carried under such prior Forgery insurance then the liability of the Company shall not exceed the smaller amount.

If the time for discovery of loss under any other terminated, canceled or expired bond or policy of Forgery insurance issued by the Company has not expired at the time Insuring Agreement V becomes effective, then liability under this Policy shall not be cumulative in amounts with liability under such other Forgery bonds or policies and shall not exceed in the aggregate, in any event, the larger or largest amount.

GENERAL AGREEMENTS

LIMITS OF LIABILITY

A. The limit of the Company's liability as specified in the table of Limits of Liability, regardless of the number of years this Policy shall continue in force or the number of annual or periodical premiums which shall be payable, or paid, shall not be cumulative from year to year, or from period to period, and shall not be increased by the inclusion herein of more than one Assured.

LIMITATIONS OF COVERAGE

B. Insuring Agreements II, III and IV apply only to such loss and damage caused by any act or event as aforesaid, committed or occurring within any of the States of the United States of America, the District of Columbia, Alaska, Hawaii, Canada, Newfoundland, Virgin Islands or Puerto Rico. None of the Insuring Agreements shall apply to loss, destruction or damage caused or contributed to by any dishonest, fraudulent or criminal act committed by a partner of the Assured, whether acting alone or in collusion with others. Insuring Agreements II, III and IV shall not apply to loss, destruction or damage (1) caused by war, whether declared or not, invasion, insurrection, rebellion, revolution, hostilities, or military or usurped power; (2) to manuscripts, records, accounts, plate glass or lettering or ornamentation thereon.

DISCOVERY PERIOD

C. The insurance afforded by Option A of Insuring Agreement I and by Insuring Agreements II, III, IV and V of this Policy shall apply only to such loss or damage which shall be discovered prior to the expiration of one year, and the insurance afforded by Option B of Insuring Agreement I shall apply only to such loss which shall be discovered prior to the expiration of two years, from the effective date of cancelation of the Policy as provided in Paragraph 13 or from the effective date of cancelation or termination of the Policy in any other manner. If, prior to the cancelation or termination of this Policy, insurance as to any Employee shall be canceled as provided in Paragraph 12, or if Option A of Insuring Agreement I or any of Insuring Agreements II, III, IV or V shall be canceled as provided in Paragraph 13, there shall be no liability under this Policy on account of any loss under the said Option A caused by such Employee nor under such canceled Insuring Agreement, unless discovered before the expiration of one year from the effective date of such cancelation, nor on account of any loss under Option B of Insuring Agreement I unless discovered before the expiration of two years from such date of cancelation as to such Employee or from such date of cancelation or termination of said Option B, as the case may be.

JOINT ASSURED (not applicable where there but one assured)

D. If more than one person, firm, corporation or other interest is named herein as Assured, the interest first named shall be the authorized representative or trustee for each and all of the other Assured and shall act as such in their behalf for all the purposes of this Policy. Knowledge possessed or discovery made by any Assured or by any partner or officer thereof shall for the purposes of Paragraphs 5, 6 and 12 constitute knowledge or discovery by the first named Assured and all of the other Assured and cancelation of the insurance hereunder as respects any Employee upon discovery as provided in Paragraph 12 shall apply to all the Assured. Written notice to or by the first named Assured shall constitute such notice to or by all Assured for all the purposes of this Policy. Acceptance by the first named Assured of any endorsement issued as provided in Paragraph 14 shall constitute

Plaintiff's Exhibit 6

THE SUCHER PACKING COMPANY
COMPUTATION OF EXCESS SHRINKAGE AND RESULTING UNEXPLAINED LOSS

For Forty-Seven Weeks Ended October 22, 1949:

Item	Carcass Weight Processed lbs.	Sales lbs.	Sales dollars	Average Selling Price dollars	Weight Shrinkage lbs.	Normal Shrinkage % (4)	Normal Shrinkage lbs.	Excess Shrinkage lbs.	Unexplained Loss (average selling price x excess shrinkage)
Fresh Pork	(1) 9,758,144	3,970,944	$ 1 526 981 04	$ .38372	199,100	½	48,791	150,309	$ 57 676 57
Smoked Pork:									
Smoked pork		2,222,953	$ 929 182 63	$ .41799	118,654	1½	33,344	85,310	$ 35 658 72
Sliced bacon		460,829	225 760 45	.48990	6,169	-o-	-o-	6,169	3 022 19
Total smoked pork		2,683,782	$ 1 154 943 08	$ .43034	124,823		33,344	91,479	$ 38 680 91
Beef Carcasses	(2) 3,704,785	3,295,430	$ 1 441 274 82	$ .43736	14,101	½	18,524	4,423*	$ 1 934 44*
Veal Carcasses	(3) 155,444	148,972	$ 68 533 13	$ .46004	2,860	½	777	2,083	$ 958 26
Sausage:									
All loaves		274,309	$ 127 406 99	$ .44259	17,996	5	13,715	4,281	$ 1 894 73
Fresh sausage		389,242	139 505 75	.35840	2,086*	2	7,789	9,875*	3 539 20*
Smoked sausage		1,574,291	558 213 61	.35458	108,178	5	78,715	29,463	10 446 99
Total sausage		2,237,842	$ 819 126 35	$ .36603	124,088		100,219	23,869	$ 8 802 52
Total for 47 weeks ended 10-22-49		12,336,970	$ 5 010 858 42	$ .40617	464,972		201,655	263,317	$ 104 183 82

For Forty-Eight Weeks Ended September 30, 1950:

Item	Carcass Weight Processed lbs.	Sales lbs.	Sales dollars	Average Selling Price dollars	Weight Shrinkage lbs.	Normal Shrinkage % (4)	Normal Shrinkage lbs.	Excess Shrinkage lbs.	Unexplained Loss (average selling price x excess shrinkage)
Fresh Pork	(1) 17,069,507	10,361,164	$ 3 229 165 54	$ .31166	175,180	½	85,348	89,832	$ 27 997 04
Smoked Pork:									
Smoked hams		1,077,348	$ 553 755 60	$ .51400	27,239	1½	16,160	11,079	$ 5 694 61
Slab bacon		684,598	247 508 67	.36154	37,673	1½	10,269	27,404	9 907 64
Smoked calas		263,959	92 639 99	.35096	16,271	1½	3,959	12,312	4 321 02
Smoked - other		260,338	60 024 15	.23056	6,668*	1½	3,905	10,573*	2 437 71*
Sliced bacon		413,082	183 779 89	.44490	2,325*	-o-	-o-	2,325*	1 034 39*
Total smoked pork		2,699,325	$ 1 137 708 30	$ .42148	72,190	1½	34,293	37,897	$ 16 451 17
Beef Carcasses	(2) 4,136,023	3,544,052	$ 1 568 799 48	$ .44266	36,237	½	20,680	15,557	$ 6 886 46
Veal Carcasses	(3) 200,920	189,295	$ 89 660 17	$ .47365	4,755	½	1,005	3,750	$ 1 776 19
Sausage:									
All loaves		300,311	$ 128 853 75	$ .42907	18,070	5	15,016	3,054	$ 1 310 38
Fresh sausage		363,318	122 132 89	.33616	3,115	2	7,266	4,151*	1 395 40*
Smoked sausage		1,496,780	519 772 98	.34726	85,866	5	74,839	11,027	3 829 24
Total sausage		2,160,409	$ 770 759 62	$ .35677	107,051	5	97,121	9,930	$ 3 744 22
Total for 48 weeks ended 9-30-50	21,406,430	18,954,245	$ 6 796 093 11	$ .35855	395,413		238,447	156,966	$ 56 855 08

Notes:

1. Fresh pork carcass weight is dressed weight after deducting 3% allowance for cooler shrinkage.
2. Beef carcass weight is dressed weight after deducting 2% allowance for cooler shrinkage.
3. Veal carcass weight is dressed weight after deducting 2% allowance for cooler shrinkage.
4. Normal shrinkage is expressed as a percentage of carcass weight processed in the case of fresh pork, beef and veal, and as a percentage of sales weight for the other items.

*Denotes figures in red

PLAINTIFF'S EXHIBIT 10

LETTERHEAD OF JOHN L. MACBETH COMPANY
INSURANCE

September 18, 1950

Abe Solomon
Sucher Packing Co.
400 North Western Avenue
Dayton, Ohio

Dear Mr. Solomon:

Pursuant to our telephone conversation it will not be necessary for you to make further formal notification of the bond loss which you reported to us September 10, as we have already passed notice of this claim on to our attorneys, Pickrel, Schaeffer & Ebeling and they have notified the company, which satisfies the requirements of the policy.

Frankly, the provision in the policy is primarily for protecting the company's privilege of investigation immediately after the discovery of the loss by the assured, whereas this privilege might be jeojardized to the detriment of the company if prompt notice is not given.

We will be glad to render any assistance in working out your claim if you will contact us when you have occasion to use our services in this regard.

Very truly yours,

_____

JOHN L. MACBETH CO.

JLB/p

PLAINTIFF'S EXHIBIT 11a

PROOF OF LOSS
to
MANUFACTURERS CASUALTY INSURANCE COMPANY

I, Abe Solomon, Treasurer of The Sucher Packing Company, of 400 North Western Avenue, Dayton, Ohio, the assured, under Policy No. 69499 issued by Manufacturers Casualty Insurance Co., which policy was in effect the 1st day of November, 1947 and thereafter, do hereby certify,

That said The Sucher Packing Co. suffered a loss through the dishonesty of Willie Earley, employed as a janitor; Robert Maiden, employed as a butcher; Helen Hurt, employed in general service; James Jackson, employed as a butcher; William Harris, employed as a killing floor laborer and truck driver, all so employed by the said assured, and other employes of said assured, whose identity is unknown at this time to said assured, and

That the entire amount of money and property dishonestly misappropriated by said persons above named and above described as of unknown identity, amounts to One Hundred Sixty-two Thousand Nine Hundred Seventy-three and 34/100 Dollars ($162,973.34), and that the following is a detailed statement of said loss and of all sums due and owing said employes of known identity, above named, and the balance stated below is the correct amount of the net loss from November 25, 1948 to September 11, 1950,

That the said dishonesty of the said employes, both named and of unknown identity above mentioned, consisted of misappropriating property of the assured, their employer. during the period above mentioned, consisting of Fresh Pork of the fair reasonable market value of Eighty-five Thousand Six Hundred Seventy-three and 61/100 ($85,673.61) Dollars, Smoked Pork of the fair reasonable

market value of Fifty-five Thousand One Hundred Thirty-two and 08/100 ($55,132.08) Dollars, Beef, and Veal Carcasses of the fair reasonable market value of Nine Thousand Six Hundred Twenty and 91/100 ($9,620.91) Dollars, and Sausage of the fair reasonable market value of Twelve Thousand Five Hundred Forty-six and 74/100 ($12,546.74) Dollars, or a total fair reasonable market value of One Hundred Sixty-two Thousand Nine Hundred Seventy-three and 34/100 ($162,973.34) Dollars.

I hereby further certify that all sums otherwise owing to said employes by way of salary or other credits are as follows:

James Jackson .....$47.25 for salary
Robert Maiden .....$56.27 for salary
William Harris .....$36.02 for salary
Willie Earley .....$35.34 for salary
Helen Hurt .....$21.87 for salary
Helen Hurt .....$11.25 deduction from salary towards purchase of United States Savings Bond,

making a total of credits otherwise due said employes of Two Hundred Eight ($208.00) Dollars.

I further certify that knowledge of said misappropriations came to said assured and to the undersigned on or about the 11th day of September, 1950, that all of said employes above named, whose identity is known, except Willie Earley, have been continuously in the employ of said assured for a period beginning prior to November 1, 1947, and continuing to September 11, 1950, and that the said Willie Earley has been continuously in the employ of said assured for a period beginning approximately June 1, 1950 and continuing until September 11, 1950, that all of said employes above named and those whose identity is now unknown, misappropriated the property of the said assured, above

Plaintiff's Exhibit 11a

specified, of the fair reasonable market value above stated, between the said dates of November 25, 1948 and September 11, 1950, to their own use and benefit with intent to deprive the assured of the same, and that the said amounts have not been paid or satisfied in any way to said assured notwithstanding that due and legal demand has been made by the said assured upon said known employes for the same;

Further, that there are no offsets whatever against said claim for salary, commissions or otherwise, other than as set forth particularly on the above statement and that the said assured has fully complied with all the conditions of said policy above mentioned in connection with said employes and said misappropriations, and that said assured has not accepted any security for or on account of same; that the net amount due said assured from the said Manufacturers Casualty Insurance Co. under said policy by reason of said misappropriations, is One Hundred Sixty-two Thousand Seven Hundred Sixty-five and 34/100 ($162,765.34) Dollars.

(Signed) Abe Solomon

Sworn to before me and subscribed in my presence by the above named Abe Solomon, personally, this 3rd day of January, 1951.

Lee Bortz, Notary Public.

(Seal)

PLAINTIFF'S EXHIBIT 12

LETTERHEAD OF MANUFACTURERS CASUALTY INSURANCE COMPANY

January 5, 1951

Abe Solomon, Treasurer
The Sucher Packing Company
P. O. Box No. 975
Dayton 1, Ohio

Re: 02S-2352 — Bond 69499

Dear Mr. Solomon:

We acknowledge receipt of proof of loss dated January 3, 1951 presenting a claim under our bond 69499. This matter will have our prompt attention.

Very truly yours,

(Signed) Wm. H. Loesche, Jr., Counsel

WHL.m

Plaintiff's Exhibit No. 15

EXACT ACTUAL INVENTORIES:

Week Ended	Beginning Inventory	Purchases & Transfers In	Total	Sales	Ending Inventory Computed	Ending Inventory Actual	Loss	Gain
Nov. 5	40	50	90	55	35	33	2	
Nov. 12	33	60	93	50	43	42	1	
Nov. 19	42	45	87	40	47	45	2	
Nov. 26	45	50	95	45	50	49	1	
Totals		205		190			6	

ESTIMATED INVENTORIES (Except at Beginning and End):

	Beginning Inventory	Purchases & Transfers In	Total	Sales	Ending Inventory Computed	Ending Inventory Estimated	Loss	Gain
Nov. 5	40	50	90	55	35	30	5	
Nov. 12	30	60	90	50	40	42		2
Nov. 19	42	45	87	40	47	43	4	
Nov. 26	43	50	93	45	48	49	1	
Totals		205		190			6	

Beginning Inventory	40
Add - Purchases and transfers in	205
	245
Less - Sales	190
Computed Inventory	55
Actual Inventory	49
Loss	6

PLAINTIFF'S EXHIBIT 17

LETTERHEAD OF PICKREL, SCHAEFFER & EBELING – LAWYERS

March 30, 1951

Sucher Packing Company
400 North Western Avenue
Dayton, Ohio

Attention: Mr. Abe Solomon

Re: Bond Claim No. 02S-2352
Sucher Packing Co. v.
Manufacturers Casualty Insurance Company

Gentlemen:

Since the meeting with you, Mr. Beerman, other officials of the Sucher Packing Company and Mr. William H. Loesche of the Manufacturers Casualty Insurance Company, a great deal of consideration has been given to your ideas regarding the amount of the loss you sustained and reported under date of September 11, 1950.

It is sincerely regretted that we cannot consider your demands favorably as we feel definitely that this contract was not intended to insure losses occurring through inventory shortages which could not be conclusively proven. We do not feel that the auditor's report marked "Exhibit A", which has been submitted to us, is conclusive proof as it does not exclude all other possible causes of such losses. At most, the auditor's report shows only the possible extent of the loss. It does not prove conclusively that the loss occurred through dishonesty of the employees.

We do think that a loss in a modest amount has been proven conclusively to have been caused by employee dishonesty. By taking a liberal interpretation of all the statements that

Plaintiff's Exhibit 17

have been obtained, we find the following items and amounts as being lost within the terms of the bond.

31 hams averaging 14 lbs. valued at 52c per lb. as stated in Sucher's auditor's report	$225.68
2 pork loins averaging 6 lbs. at 38c per lb., listed as fresh pork in the audit	4.56
10 slabs of bacon, averaging 10 lbs. valued at 48c per lb. in the auditor's report	48.00
30 lbs. of beef at 43c per lb.	12.90
Total	$291.14

In meeting the obligation of our client, we have enclolsed draft in the amount of $291.14 in payment of this loss.

Yours very truly,

PICKREL, SCHAEFFER & EBELING

(Signed) Lamont N. Rennels

LNR/jw
enc.

Plaintiff's Exhibit 21

THE SUCHER PACKING COMPANY
COMPUTATION OF EXCESS SHRINKAGE AND RESULTING UNEXPLAINED LOSS

For Forty-Seven Weeks Ended October 22, 1949:

Item		Carcass Weight Processed lbs.	Sales lbs.	Sales dollars	Average Selling Price dollars	Weight Shrinkage lbs.	Normal Shrinkage % (4)	Normal Shrinkage lbs.	Excess Shrinkage lbs.	Unexplained Loss (average selling price) (x excess shrinkage)
Fresh Pork	(1)	9,758,144	3,970,944	$ 1 526 981 04	$ .38372	199,100	½	48,791	150,309	$ 57 676 57
Smoked Pork:										
Smoked pork			2,222,953	$ 929 182 63	$ .41799	118,654	1½	33,344	85,310	$ 35 658 72
Sliced bacon			460,829	225 760 45	.48990	6,169	-0-	-0-	6,169	3 022 19
Total smoked pork			2,683,782	$ 1 154 943 08	$ .43034	124,823		33,344	91,479	$ 38 680 91
Sausage:										
All loaves			274,309	$ 121 406 99	$ .44259	17,996	5	13,715	4,281	$ 1 894 73
Fresh sausage			389,242	139 505 75	.35840	(2,086)	2	7,789	(9,875)	(3 539 20)
Smoked sausage			1,574,291	558 213 61	.35458	108,178	5	78,715	29,463	10 446 99
Total sausage			2,237,842	$ 819 126 35	$ .36603	124,088		100,219	23,869	$ 8 802 52
Total for 47 weeks ended 10-22-49			8,892,568	$ 3 501 050 47	$ .39371	448,011		182,354	265,657	$ 105 160 00

For Forty-Eight Weeks Ended September 30, 1950:

Item		Carcass Weight Processed lbs.	Sales lbs.	Sales dollars	Average Selling Price dollars	Weight Shrinkage lbs.	Normal Shrinkage % (4)	Normal Shrinkage lbs.	Excess Shrinkage lbs.	Unexplained Loss (average selling price) (x excess shrinkage)
Fresh Pork	(1)	17,069,507	10,361,164	$ 3 229 165 54	$ .31166	175,180	½	85,348	89,832	$ 27 997 04
Smoked Pork:										
Smoked hams			1,077,348	$ 553 755 60	$ .51400	27,239	1½	16,160	11,079	$ 5 694 61
Slab bacon			684,598	247 508 67	.36154	37,673	1½	10,269	27,404	9 907 64
Smoked calas			263,959	92 639 99	.35096	16,271	1½	3,959	12,312	4 321 02
Smoked - other			260,338	60 024 15	.23056	(6,668)	1½	3,905	(10,573)	(2 437 71)
Sliced bacon			413,082	183 779 89	.44490	(2,325)	-0-	-0-	(2,325)	(1 034 39)
Total smoked pork			2,699,325	$ 1 137 708 30	$ .42148	72,190	1½	34,293	37,897	$ 16 451 17
Sausage:										
All loaves			300,311	$ 128 853 75	$ .42907	18,070	5	15,016	3,054	$ 1 310 38
Fresh sausage			363,318	122 132 89	.33616	3,115	2	7,266	(4,151)	(1 395 40)
Smoked sausage			1,496,780	519 772 98	.34726	85,866	5	74,839	11,027	3 829 24
Total sausage			2,160,409	$ 770 759 62	$ .35677	107,051	5	97,121	9,930	$ 3 744 22
Total for 48 weeks ended 9-30-50			15,220,898	$ 5 137 633 46	$ .33754	354,421		216,762	137,659	$ 48 192 43

Notes:
1. Fresh pork carcass weight is dressed weight after deducting 3% allowance for cooler shrinkage.
4. Normal shrinkage is expressed as a percentage of carcass weight processed in the case of fresh pork, and as a percentage of sales weight for the other items.

( ) Denotes red figures.

THE SUCHER PACKING COMPANY
COMPUTATION OF EXCESS SHRINKAGE AND RESULTING UNEXPLAINED LOSS

(P. 242a)

THE SUCHER PACKING COMPANY
ADJUSTMENTS AND REVISED CLAIM

Plaintiff's Exhibit

For Forty-Seven Weeks Ended October 22, 1949:

Item	Carcass Weight Processed lbs.	Sales lbs.	Sales dollars	Average Selling Price dollars	Weight Shrinkage lbs.	Normal Shrinkage % (4)	Normal Shrinkage lbs.	Excess Shrinkage lbs.	Unexplained loss (average selling price) x excess shrinkage	Deduction For Meat Used In Employees' Cafeteria	Deduction For Last Three Weeks In Sept. 1950	Net Amount of Loss After Deduction For Cafeteria Meat and Three Weeks of Sept.
Fresh Pork	(1) 9,758,144	3,970,944	$ 1 526 981 04	$ .38372	199,100	½	48,791	150,309	$ 57 676 57	$ 920 93		$ 56 755 64
Smoked Pork:												
Smoked pork		2,222,953	$ 929 182 63	$ .41799	118,654	1½	33,344	85,310	$ 35 658 72	(2400 lbs. @ .38372)		
Sliced bacon		460,829	225 760 45	.48990	6,169	-0-	-0-	6,169	3 022 19			
Total smoked pork		2,683,782	$ 1 154 943 08	$ .43034	124,823		33,344	91,479	$ 38 680 91			$ 38 680 91
Sausage:												
All loaves		274,309	$ 121 406 99	$ .44259	17,996	5	13,715	4,281	$ 1 894 73			
Fresh sausage		389,242	139 505 75	.35840	2,086*	2	7,789	9,875*	3 539 20*	(2400 lbs. .40)		
Smoked sausage		1,574,291	558 213 61	.35458	108,178	5	78,715	29,463	10 446 99	$ 960 00		$ 7 842 52
Total sausage		2,237,842	$ 819 126 35	$ .36603	124,088		100,219	23,869	$ 8 802 52			
Total for 47 weeks ended 10-22-49		8,092,568	$ 3 501 050 47	$ .39371	448,011		182,354	265,657	$ 105 160 00	$ 1 880 93		$ 103 279 07

For Forty-Eight Weeks Ended September 30, 1950:

Item	Carcass Weight Processed lbs.	Sales lbs.	Sales dollars	Average Selling Price dollars	Weight Shrinkage lbs.	Normal Shrinkage % (4)	Normal Shrinkage lbs.	Excess Shrinkage lbs.	Unexplained Loss (average selling price) x excess shrinkage	Deduction For Meat Used In Employees' Cafeteria	Deduction For Last Three Weeks In Sept. 1950	Net Amount of Loss After Deduction For Cafeteria Meat and Three Weeks of Sept.
Fresh Pork	(1) 17,069,507	10,361,164	$ 3 229 165 54	$ .31166	175,180	½	85,348	89,832	$ 27 997 04	$ 920 93	$ 1 749 81	$ 25 326 30
Smoked Pork:												
Smoked hams		1,077,348	$ 553 755 60	$ .51400	27,239	1½	16,160	11,079	$ 5 694 61			
Slab bacon		684,598	247 508 67	.36154	37,673	1½	10,269	27,404	9 907 64			
Smoked calas		263,959	92 639 99	.35096	16,271	1½	3,959	12,312	4 321 02			
Smoked - other		260,338	60 024 15	.23056	6,668*	1½	3,905	10,573*	2 437 71*			
Sliced bacon		413,082	183 779 89	.44490	2,325*	-0-	-0-	2,325*	1 034 39*			
Total smoked pork		2,699,325	$ 1 137 708 30	$ .42148	72,190	1½	34,293	37,897	$ 16 451 17		1 028 19	15 422 98
Sausage:												
All loaves		300,311	$ 128 853 75	$ .42907	18,070	5	15,016	3,054	$ 1 310 38			
Fresh sausage		363,318	122 132 89	.33616	3,115	2	7,266	4,151*	1 395 40*			
Smoked sausage		1,496,780	519 772 98	.34726	85,866	5	74,839	11,027	3 829 24			
Total sausage		2,160,409	$ 770 759 62	$ .35677	107,051	5	97,121	9,930	$ 3 744 22	$ 960 00	234 00	2 550 22
Total for 48 weeks ended 9-30-50		15,220,898	$ 5 137 633 46	$ .33754	354,421		216,762	137,659	$ 48 192 43	$ 1 880 93	$ 3 012 00	$ 43 299 50

Notes:
1. Fresh pork carcass weight is dressed weight after deducting 3% allowance for cooler shrinkage.
4. Normal shrinkage is expressed as a percentage of carcass weight processed in the case of fresh pork, and as a percentage of sales weight for the other items.

* Denotes figures in red

Total for both periods	$ 146 578 57
Deduct payments withheld from Harris, Jackson, Maiden, Hurt and Farly	208 00
Adjusted amount of claim	$ 146 370 57

Product Analysis — WE 2-4-50

Typical Weekley Product Analysis Sheet from Plaintiff's Exhibit 4 (P. 243a)

		Opening Inventory Wt	Opening Inventory Cwt		Purchases Wt	Purchases Cwt	Pond Packings & Supplies	Transfers Wt	Transfers Cwt		Sales Wt	Sales Cwt		Transfers Wt	Transfers Cwt	Closing Inventory Wt	Closing Inventory Cwt		Shrinkage	Natural Profit
Fore Cattle	53	56377	93259	18	111340	199193							119	114157	200648	57560	91977			
Freight & Other Charges			2552			7049									6419		3082			
Beef Offal		9121	57426						128608		4442	9357		1600	24573	9009	55615			10521
Beef Carcass & Cuts		57617	200632				11000	58160	1763071		45998	1772890		16011	497652	38063	1283483			
Fabricated Beef		17292	47310		4765	139113					2052	103788				12900	430762		1980	246769
Beef Skins									108820		7435	17699								20879
Total Beef			318552			2141955	11000		2060999		78957	3019952			733102		769219			307507
Live Veal				22	4355	13686							22	4355	13686					
Veal Offal		81	558						10057		182	13493				13	709			2769
Veal Carcass		4946	27650				500	2565	115577		5265	270747		132	4755	1606	78531		345	11714
Veal Skins									9800		366	11401								1601
Total Veal			32034			13686	500		135434		5716	295841			141071		79240			11046
Total Pork			1059815			5651188	124500		9655592		243697	7035136			1007775		9800838			82620
Sausage Raw Meats		13762	37335					2456	567317					26[illegible]	601533	11370	339597		100	1422
Natural Casings			46349			4985			11005			3625			65322		460193			3246
Ex Kings			80124												18055		78045			2713
Spices			32846			5516									37671		34478			5543
Veal Loaf		5557	19860				500	3357	79353		4952	194777				3702	174321		320	4109
Frankfurt Sausage		3179	8589				1000	4559	98006		5556	183759			2671	1610	47601		68	6497
Smoked Sausage		16248	46618				20000	2510	24627		24300	783141			16342		476573		1016	23481
Total Sausage			268841			16510	30000		131539		34810	1163332			733010		2588761			34017
Sundries		7080	25130				1000	856	6676		5139	192874				5770	21330			8600
Total Plant			1735232			8461796	167000				414170	11759035					15373659			1571895

Note not on original exhibit: Circled figures represent shrinks in Shrinks or Gains Column. Uncircled figures represent gains in Shrinks or Gains Column. Cured meats gain weight due to curing process.

See Next Page for Pork

Product Analysis WE 2-4-50

Pork Only

	Open Inventory Wt	Open Inventory Cost	Purchases Wt	Purchases Cost	Prod Packages & Supplies	Trans fers In Wt	Trans fers In Cost	Trans fers Out Wt	Trans fers Out Cost	Sales Wt	Sales Cost	Trans fers Out Wt	Trans fers Out Cost	Close Inv 167 Wt	Close Inventory Cost	Shrink Gain	Natural Cost
Fresh Hogs	504450	830731	30810	52						5214	7474	1401 316770	5867615	34470	660077		
Pork Offal	24408	32575					164		164731					1939	20555	36309	41000		18818
Fresh Pork	178892	359654	9467	38580	10000	29394	51435	29394	51435	16575	48337	80		74759	137763	168337	330040	(4082)	412953
Lard	21558	58240			6500	30554	2740	30554	2740	2360	2254					72256	65487	(176)	25349
Total Pork	333308	532263	14477	56476	7500		55520		55520	197149	504970				65950		525558		457120
Cured Hams	36470	126732			300	12433	4980	12433	49897	140	792	33120	1276585	20605	655445	4962	283321
Picnics					1500	4590	1690	4590	16901			5330	131553			746	24070
Bellies	106625	225539			3000	13050	3100	13050	31037	392	7936	54330	1376466	76495	1372804	54332	1556902
Other	40154	51354			1500	990	990	990	9911	789	18396	4755	105715	34171	403122	(449)	234641
Smoked Hams	5147	21422			8000	26410	11425	26410	114255	21875	75929			5598	377466	(764)	1950
Bellies	10791	31506			5000	4536	13766	4536	13766	5547	16952			45346	135985		
Shipped Bellies	10410	33436												8790	45240	(5978)	(137154)
Smoked Cales	2095	6755			1000	4672	1340	4672	13483	2673	8418	8002	255792	3914	109592	(166)	(8562)
Smoked Other	3445	5252	157	1476	5000	40000	16500	40000	16591	4359	8046			2798	87884	(465)	(5653)
Sliced Bacon	3552	12906			7500	2340	7500	2340	7246	7254				4176	133642	31	53655
BB Hams Raw					1580	155	1580	155				70	630	300	16500		
Trimmed	1737	12771			2385		2385			2727	7247			1035	72450	(162)	846
Total Processed Pork	216566	525755		1476	50000		410611		410615	45948	185066		3147994		4772280		3697600
Total Pork Department		1057515		1576545	124800		96888		96888	243097	765036		10007775		9800538		8269200

AFFIDAVIT OF JEROME GOLDMAN
(Filed July 11, 1956)

United States of America,
State of Ohio,
Hamilton County, SS:

Jerome Goldman, being first duly sworn, says he is the attorney for appellant in the above-entitled case, and was attorney in the trial of the above-entitled case in the United States District Court.

Affiant says, as shown by the typewritten transcript of the proceedings of the trial at pages 1136 to 1138 of the same, found at pages 208a and 209a of appellant's Appendix, before final argument, the Trial Court instructed the Jury it was not to consider any evidence of inventory shortage, and further that such evidence was not to be used by the Jury as any measure in determining any loss to plaintiff.

Affiant further says that after such action taken by the Court, counsel for defendant at the trial, requested a realignment of the Exhibits, and that the Court then stated at page 1138 of the typewritten transcript below (page 210a of appellant's Appendix):

> "It is correct that only those exhibits which will be pertinent to the issue now before the Jury should be submitted to the Jury, if you can ascertain this before the case goes to the Jury."

Thereupon counsel for defendant and counsel for plaintiff, pursuant to the Court's instruction, during a recess in the proceedings prior to the submittal of the case to the Jury, separated from all the exhibits that had been admitted in evidence, the following: Plaintiff's Exhibits 1A, 2, 3, 4, 6, 14, 14A, 14B, 14C, 16A, 16B, 16C, 21, and 22, and Defendant's Exhibits G, H, I, J, K, L, V and W, and the

aforesaid Exhibits so separated were not transmitted to, but withheld from, the Jury.

Affiant makes this Affidavit to supply an omission in the record of part of the trial proceedings which did not occur in the presence of the trial Judge and therefore was not included in the typewritten transcript of the proceedings below.

/s/ Jerome Goldman

Sworn to before me and subscribed in by presence this 11th day of July, 1956.

/s/ Julian Rubin,
Notary Public.

No. 12815

In the

United States Court of Appeals

For the Sixth Circuit

THE SUCHER PACKING CO.,

Appellant,

vs.

MANUFACTURERS CASUALTY INSURANCE CO.,

Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Western Division

APPELLEE'S BRIEF AND APPENDIX

WILLIAM G. PICKREL,
WILLIAM H. SILVA,
Attorneys for Appellee.

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I.

Is the Trial Court justified in withdrawing from the Jury's consideration inventory shortage based upon pound shrinkage shown on plaintiff's weekly production sheets which, according to the testimony of plaintiff's employees, are largely estimates of gains and shrink of meat products where the accurate actual record count contained on the inventory at the fiscal close taken by the auditors is not produced, nor are records of hog carcass sales and lard sales produced and there is no evidence of plaintiff's shrink experience or of the temperature and humidity maintained in the cooler, chill or other rooms in plaintiff's plant, the source of feed of animal and other factors affecting shrink and the inventory shortage was determined by simply adding the weight gains and shrinks shown for the selected weeks offered in evidence, subtracting one from the other and characterizing the remainder as "unexplained loss", and the only evidence of identifiable items stolen consisted of 31 hams, 2 pork loins, 10 slabs of bacon and 30 pounds of beef, and weight gains and shrinks experienced by plaintiff before and following the period of the alleged loss are not produced?

The Trial Court said "Yes".

Appellee agrees.

II.

May the Trial Judge withdraw alleged loss caused by unidentifiable employees where there is no evidence that any unidentifiable employee removed any hams, shoulders or bacon from plaintiff's meat plant and there is no substantial evidence that any unidentifiable employee actually removed

pork loins from plaintiff's plant and plaintiff's counsel removes sausage from the consideration of the Jury?

The Trial Court said "Yes".

Appellee agrees.

III.

Under the facts in Question I, is the Trial Court permitted to submit a special verdict permitting the Jury to find upon the remaining issues in the case by answering specific questions and to make additional findings of facts not included in the questions propounded in the special verdict?

The Trial Court said "Yes".

Appellee agrees.

IV.

Where a witness, who refuses to testify, has given a signed confession or statement to another witness can counsel ignore the signed statement and attempt to offer an alleged excerpt from the signed statement by calling the person who took the statement as his witness?

The Trial Court said "No".

Appellee agrees.

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Counter Question No. 1:

Is the Trial Court justified in withdrawing from the Jury's consideration inventory shortage based upon pound shrinkage shown on plaintiff's weekly production sheets which, according to the testimony of plaintiff's employees, are largely estimates of gains and shrink of meat products where the accurate actual record count contained on the inventory at the fiscal close taken by the auditors is not produced, nor are records of hog carcass sales and lard sales produced and there is no evidence of plaintiff's shrink experience or of the temperature and humidity maintained in the cooler, chill or other rooms in plaintiff's plant, the source of feed of animal and other factors affecting shrink and the inventory shortage was determined by simply adding the weight gains and shrinks shown for the selected weeks offered in evidence, subtracting one from the other and characterizing the remainder as "unexplained loss" and the only evidence of identifiable items stolen consisted of 31 hams, 2 pork loins, 10 slabs of bacon and 30 pounds of beef, and weight gains and shrinks experienced by plaintiff before and following the period of the alleged loss are not produced.

The Trial Court said "Yes".

Appellee agrees 6

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Counter Question No. 2:
May the Trial Judge withdraw alleged loss caused by unidentifiable employees where there is no evidence that any unidentifiable employee removed any hams, shoulders or bacon from plaintiff's meat plant and there is no substantial evidence that any unidentifiable employee actually removed pork loins from plaintiff's plant and plaintiff's counsel removes sausage from the consideration of the Jury?

The Trial Court said "Yes".
Appellee agrees 16

Counter Question No. 3:
Under the facts in Question I, is the Trial Court permitted to submit a special verdict permitting the Jury to find upon the remaining issues in the case by answering specific questions and to make additional findings on facts not included in the questions propounded in the special verdict?

The Trial Court said "Yes".
Appellee agrees 18

Counter Question No. 4:
Where a witness, who refuses to testify, has given a signed confession or statement to another witness can counsel ignore the signed statement and attempt to offer an alleged excerpt from the signed statement by calling the person who took the statement as his witness?

The Trial Court said "No".
Appellee agrees 20

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In the

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. ———

THE SUCHER PACKING CO.,

Appellant,

vs.

MANUFACTURERS CASUALTY INSURANCE CO.,

Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Western Division

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APPELLEES BRIEF

COUNTER STATEMENT OF FACTS

Appellant does not undertake to state the facts in clear, concise, chronological order, but intermingles opinions, arguments, statements and conclusions which are frequently unsupported by the record.

Plaintiff on the day of trial withdrew beef and veal losses from consideration of the Jury because "its records of such losses were wholly unreliable" and still, plaintiff now relies on alleged disappearance of beef and veal products as evidence of employee dishonesty.

Appellant, while contending that careful and detailed records were kept to show the disposition of the product from slaughter to sale, omits to inform this Court that according to the testimony of plaintiff's employees who were in charge of its packing plant:

(a) The alleged unexplained inventory loss was determined by adding the alleged gains and shrinks shown in each approximate weekly inventory (7b, 8b) submitted for each period, subtracting the gains from the shrinks and labeling the remainder "unexplained loss" (38b, 40b, 41b). No audit being attempted (15b, 41b).

(b) The alleged unexplained loss or shrink could come from errors in transfer, errors in taking the inventory, additional shrink due to spoilage, mistakes, improper shrinkage factors or theft (12b, 26b, 27b, 28b, 37b, 38b, 39b, 42b).

(c) The shortage complained of was based upon approximate inventories (7b, 8b, 19b).

(d) Plaintiff's auditor would not give his unqualified certificate to any of the figures contained in the weekly production analysis sheets from which the inventory loss was prepared (44b).

(e) Plaintiff had no records to show its shrink experience (6b, 20b, 52b, 53b) as plaintiff was never concerned with shrink (42b) and shrink experience was never determined from any audit (41b) and no shrink tests were made (47b, 48b).

(f) There were no figures set up and charged to theft on plaintiff's records (43b).

(g) The only accurate inventory was that taken by the auditors at the fiscal close and this inventory was never given to the accountant who prepared the inventory shortage (7b, 24b, 25b, 26b). (The auditor's inventory prepared at the fiscal close was frequently demanded but never produced during the trial.)

(h) That there were substantial shrink shortages for the weeks immediately after Harris was apprehended on September 11, 1950, (23b) and plaintiff's analysis sheets still provide for weekly shrinks and gains (30b, 43b).

(i) There were no records kept by plaintiff of the meat employees were permitted to use in the cafeteria (26b, 48b, 49b).

(j) Plaintiff is unable to say what amount of meat anyone was charged with stealing (33b, 34b).

(k) That "gambrels", from which the hog is hung, were weighed with the hog as the hog entered the cooler and removed when the hog entered the cutting room (21b, 22b, 23b. Deft's. Ex. G). No credit was ever allowed for the weight of the "gambrels".

(l) There were no reports of anyone wrongfully removing meat from plaintiff's plant (30b, 46b, 47b).

(m) When Harris was apprehended plaintiff was just starting a count system to determine accuracy (51b).

(n) Air circulation, temperature, refrigeration, humidity, source and feeding of the hog all have a definite affect on shrinkage (53b, 54b, 55b, 56b). There were no records produced for the periods claimed, for any of these factors (53b).

(o) That plaintiff's records show that William Harris was employed July 26, 1950 (19b, 20b, 32b).

(p) Plaintiff refused to produce and offer the signed statement of James Jackson or any other employee even though defendant moved for such production (71b).

(q) Dressed whole hog sales were included in the inventory, but accurate records of such sales were not produced, although promised (22b) and the volume of bone removed in preparing pork hotel cuts was not known. (49b).

(r) William Harris never stated how many hams and bacons *were* placed in any barrel. He stated how many *could* be put in a container (19a).

These are just a few of the omissions on the part of plaintiff who was required, under the law, to establish the integrity, reliability and accuracy of the inventory figures which it relied upon to establish an unexplained inventory shrink in pounds, caused as a result of the default or acts of its employees.

One thing that plaintiff did remove as a cause of the unexplained inventory loss, according to Arthur Beerman, plaintiff's president, was theft (128a, 129a, 45b, 46b).

On September 11, 1950, plaintiff caught William Harris, one of plaintiff's employees, attempting to remove several hams and shoulders from plaintiff's plant. This meat was returned to stock and Harris was interrogated by Frances Merica, a detective of thirty-eight years experience, employed by plaintiff, who took signed statements from Harris, Jackson, Maiden, Early and Hurt, and interviewed all other plant employees and found one ham that had been taken from plaintiff's premises (46b).

On said date, plaintiff carried a fidelity insurance policy effective for three years, commencing November 1, 1947, with defendant and reported this attempted theft and, as a result of detailed investigation, it was determined that plaintiff had sustained a loss of 31 hams, 2 pork loins, 10 slabs of bacon and 30 pounds of beef, having a total value of $291.14, which amount defendant offered to pay and tendered to plaintiff. (Plaintiff's Ex. 17).

On January 5, 1951, Proof of Claim covering a two-year period was received by defendant in which plaintiff claimed a loss in fresh pork of $85,673.61, Smoked pork of $55,132.08, Beef and Veal of $9,620.91 and Sausage of $12,546.74, a total of $162,973.34 (Plaintiff's Ex. 11A).

On September 2, 1952, almost two years after Harris was apprehended, plaintiff filed its petition in which it claimed a loss of meat products, during the *three* year period beginning November 1, 1947, consisting of $85,673.61 on fresh pork; $55,132.08 on smoked pork; $9,620.91 on beef and veal and $12,546.74 on sausage, a total of $162,973.34, based on the difference between approximate pound gains and shrink from weekly production sheets.

Thereafter, plaintiff filed its amended complaint, and its first amended complaint in which it continued to contend that its loss during the *three* year period from November 1, 1947, was as stated in its original petition.

On November 29, 1955, the first day of trial, plaintiff filed its second amended complaint in which it changed its claim of loss of fresh pork from $85,673.31 to $82,081.94; of smoked pork from $55,132.08 to $54,103.89; of sausage from $12,546.74 to $10,392.74; of beef and veal from $9,620.91 to $0., a total of $146,370.57, but continued to maintain that such loss occurred over a period of *three* years beginning November 1, 1947.

During the trial, plaintiff's second amended complaint was amended at bar by reducing the period of claimed loss from *three* years beginning November 1, 1947, to the period from November, 1948, to September 11, 1950. The amount claimed of $146,370.57 remained unchanged at least for a few days, until plaintiff discovered that it had charged defendant with shrink in pork products of 21,408 pounds arising between September 11 and 30, 1950, having a value of $6,672.02 on which plaintiff allowed defendant a credit of $1,749.81 (24b).

On the final day of the trial, plaintiff's second amended complaint was again amended at bar by credit for three weeks (24b, 67b) and an allowance for meat consumed by employees in their cafeteria and these credits resulted in

the vacillating prayer being increased from $146,370.57 to $146,578.57. The unexplained inventory loss of approximate pounds was still as unexplained at the end of the trial as it was at the beginning.

ARGUMENT

I.

Is the Trial Court justified in withdrawing from the Jury's consideration inventory shortage based upon pound shrinkage shown on plaintiff's weekly production sheets which, according to the testimony of plaintiff's employees, are largely estimates of gains and shrink of meat products where the accurate actual record count contained on the inventory at the fiscal close taken by the auditors is not produced, nor are records of hog carcass sales and lard sales produced and there is no evidence of plaintiff's shrink experience or of the temperature and humidity maintained in the cooler, chill or other rooms in plaintiff's plant, the source of feed of animal and other factors affecting shrink and the inventory shortage was determined by simply adding the weight gains and shrinks shown for the selected weeks offered in evidence, subtracting one from the other and characterizing the remainder as "unexplained loss" and the only evidence of identifiable items stolen consisted of 31 hams, 2 pork loins, 10 slabs of bacon and 30 pounds of beef, and weight gains and shrinks experienced by plaintiff before and following the period of the alleged loss are not produced.

The Trial Court said "Yes".

Appellee agrees.

Appellant's question is predicated upon the erroneous hypothesis that the records of inventory pound shortage

were accurate and accounted for the complete disposition of the product in the honest course of business.

This hypothesis cannot be justified by the evidence which clearly discloses that the inventories were approximates.

It was the obligation of plaintiff to offer an inventory based on reliable, accurate figures, not on approximations and estimates which changed daily during the trial and are still so uncertain that plaintiff's accountant refused to certify his analysis as correct.

Appellant says that the most grievous error was the action of the Trial Court in excluding appellant's inventory records from the consideration of the Jury.

There were certain exhibits that counsel, by agreement, decided should not be sent to the Jury, but no record of the exhibits which were withdrawn was requested or was made and the Court was never requested to pass upon the relevancy of any exhibit which was withdrawn by counsel.

The record discloses that the following occurred:

(71b, 72b)

"MR. SELVA: May it please the Court, in view of defendant's present position, we respectfully request a realignment of the exhibits and respectfully request an order requiring plaintiff at this time to produce original statements of Helen Hurt, James Maiden, William Harris, James Jackson and Willie Early, for submission to the Jury.

"THE COURT: That motion will be overruled. It is correct that only those exhibits which will be pertinent to the issue now before the Jury should be submitted to the Jury, if you can ascertain this before the case goes to the Jury."

This Court will observe that there was no objection of record to this action of the Trial Court, nor was there any request made by counsel to have the Court rule on the individual exhibits being withdrawn by agreement of counsel.

nor was any attempt made to make any record of the exhibits which were submitted to, or withdrawn from, the consideration of the Jury. It was not thought to be of any importance at the time; counsel agreed on those exhibits that were to be withdrawn, but now predicates error upon acts which were never submitted to the Trial Judge. *Columbia Horse and Mule Commission* v. *American Ins. Co.* (6th Cir.) 173 F. (2d) 773.

THE EXHIBITS:

Appellant's exhibits were offered and admitted, then found to be unreliable and erroneous by defendant; whereupon, appellant changed and modified and offered new exhibits which were in turn found unreliable, for example, Exhibit 6 was introduced (114a), twelve copies given to the Jury so they could follow the testimony (114a) and during the testimony Exhibit 6 was discovered to contain beef and veal computations which had been withdrawn by counsel (45b). Therefore, Exhibit 6 was collected, redrafted and replaced by Exhibit 21 which, likewise, was determined to be inaccurate while being explained to the Jury and was likewise collected, amended, modified at the last moment by deducting an arbitrary amount for meat consumed by employees in the cafeteria and allowing a credit of $3,065.00 for losses of $11,442.41 which had been charged against defendant for the pound shortage for three weeks following September 11, 1950, and Exhibit 21, which was originally Exhibit 6, then became Exhibit 22 and let's look at Exhibit 22 (68b, 69b).

In the first period of forty-seven weeks plaintiff deducted three percent cooler shrink and charged defendant with 9,758,144 pounds of fresh pork, then plaintiff allowed a credit of 8,892,568 pounds sold during the period which, according to plaintiff's computation, left 865,567 pounds

Plaintiff then allowed a credit of 448,011 pounds weight shrinkage and this left a balance of 417,565 pounds of pork wholly unaccounted for in the first period of Exhibit 22.

In the second period of 48 weeks, defendant is charged with 17,069,507 pounds of fresh pork and is then given a credit of 15,220,898 pounds sold leaving a balance of 1,848,609 pounds. Plaintiff then credits a weight shrinkage of 254,421 pounds and, we have a balance of 1,494,188 pounds wholly unaccounted for during the second period of Exhibit 22.

This huge unexplained difference of 1,912,353 still remains after three revisions, modifications and amendments of this exhibit which first was 6, then 21, and now 22.

The other exhibits were introduced by the box full and were represented to be the 95 weeks of production analysis sheets from which Exhibit 22 was prepared so, it is obvious that these exhibits of disarranged periods without individual identification being offered by the box full were not only approximates, but erroneous to the extent of 1,912,353 pounds according to plaintiff's figures.

It is also of interest to note that on the basis of plaintiff's figures contained in its exhibit 22, plaintiff sets forth weight shrinkage of 448,011 pounds on 9,758,144 pounds processed during the incomplete first period of 47 weeks, slightly less than 5 percent but in processing 17,069,507 pounds during the incomplete second period of 48 weeks plaintiff allegedly sustained a weight shrinkage of 354,421 pounds, slightly less than 2¾ percent.

We also call this Honorable Court's attention to the fact that over four and one-half million pounds of pork were held in storage over weekends during the first period and over six million pounds of pork were held in storage over the weekends of the second period. It was conceded that for each day that meat was held in storage after the first

twenty-four hours, there is additional shrink but, although the records of plaintiff clearly shows this situation, no credit is allowed defendant for this additional shrink which is just ignored by plaintiff (Deft's. Ex. V).

These were the alleged reliable, accurate records which plaintiff wished to submit to the Jury which plaintiff's auditor refused to certify (15b, 44b).

This was the inventory shortage that Kenneth Smith, plaintiff's Vice-President, admitted was based upon approximate inventories (7b, 8b).

This was the inventory that plaintiff's Treasurer testified was prepared by the auditor who was never given the accurate inventory taken at the fiscal close (24b).

THE THEFTS:

Plaintiff wanted the Jury and Trial Court to believe that the alleged inventory pound loss of meat products was caused by theft by its employees and to do so, it was the obligation of plaintiff to eliminate causes for which the employees were not responsible.

Mr. Kenneth Smith, plaintiff's Vice-President, never saw anyone attempting to steal anything (61a). He had no records of anyone being caught stealing meat (61a).

Mr. Abe Solomon, plaintiff's Treasurer, neither saw nor received any report of anyone taking meat from plaintiff's plant (30b). He was unable to say what amount of meat anyone was charged with stealing (33b, 34b).

Mr. Ray McConkey, plaintiff's Plant Superintendent, had no knowledge of any employee taking any meat (47b).

Mr. Francis Merica, Plaintiff's Detective, never caught anyone taking anything (46b).

Mr. Arthur Beerman, plaintiff's President, saw one employee, sometime in 1948, taking some weiners out of the plant which amounted to 40 or 50 cents (130a).

Mr. **Beerman** said guards were added, windows closed, detectives worked inside the plant, locks were changed, persons were checked going in and out of the plant by hired guards (129a).

Mr. **Robert Hadeler**, plaintiff's accountant, admitted that the loss could be attributed to errors in transfer, errors in taking inventory, additional shrink due to spoilage, mistakes, improper shrinkage factors or from theft (38b, 39b).

It was obvious that the pound inventory loss could not be attributed to employee dishonesty.

THE SHRINK:

Of course meat shrinks, but plaintiff was never concerned with shrink (41b). There were no figures made from any audit to determine shrink (6b, 41b, 52b) and no shrink tests were made at plaintiff's plant (47b, 48b).

The testimony showed conclusively that plant conditions, equipment, air circulation, room temperature, refrigeration, humidity, source and feeding of animal all have a profound effect on the percentage the animal will shrink (53b, 54b, 55b, 56b) and plaintiff made no record of or offered evidence on any of these important factors (52b) and had even destroyed records of temperature for the period involved (53b).

While there was a gambrel included in the weight of each of the 2,000 hogs processed each week (21b, 22b, 23b, Deft's. Ex. G), no credit was ever allowed for the weight of the gambrel.

No allowance was made for millions of pounds of pork held over the weekend (65b, 66b, 69b).

Plaintiff failed to introduce any record of its shrink experience following September 11, 1950, so the shrink of the hog was still uncertain and speculative with the plaintiff attempting to repudiate its own record showing a cooler shrink of three percent on exhibit 22 (21b).

What was taken from the hog would certainly reduce its weight. Plaintiff admitted large quantities of pork was transferred to lard (22b, 37b 38b), but no lard figures were ever produced, nor was credit allowed (66b). However, for a four-week period in December, 1948, plaintiff's records disclosed it sold 198,048 pounds of lard receiving $41,275.13; for a four-week period in October, 1949, plaintiff sold 220,966 pounds of lard receiving $36,124.57; for a four-week period in November, 1949, plaintiff sold 208,206 pounds of lard receiving $29,178.16 and for the weeks ending August 19, 26, September 2 and 9, plaintiff sold 209,324 pounds of lard receiving $38,944.33 (Deft's. Ex. W).

Plaintiff admitted that this lard came from the fresh pork charged to defendant, but utterly failed to allow any credit.

Contained in the 9,758,144 pounds of pork charged to defendant during the first period and the 17,069,507 pounds of fresh pork charged to defendant during the second period, were millions of pounds of whole dressed hogs shipped from plaintiff's packing plant by the boxcar loads (5b). It was never contended by plaintiff that anyone ever took a whole hog, not even Harris. How many millions of pounds of whole hogs were shipped no one knows as these records, while promised, were never produced (4b, 5b, 6b, 22b, 91a). Under no circumstances, could this unknown millions of pounds of weight have been "unexplained loss" or inventory pounds of shortage. The only way these whole dressed hogs left the plant was in railroad box cars, but no record of whole carcass sales were produced.

Spoilage? The plaintiff never had any pork spoil — there were no figures in plaintiff's books for spoilage of meat. In 27 million pounds of processed meat, there was not one pound of spoiled meat.

The Trial Court surveyed this hodge podge of statistics, these variables, these various changes in exhibits which were offered as correct documents, the various averaged credits, the approximated inventories, the absence of the fiscal end inventory, the boxes full of exhibits (10b, 11b) the absence of records of material conditions that affect shrink, the refusal of the certified public accountant to certify his result, or the correctness of plaintiff's figures, the admission that the inventory shortage was as attributable to mistakes, spoilage, errors in transfer, improper shrinkage factors, errors in taking the inventory as from theft and, refused to allow the Jury to guess and speculate by withdrawing the inventory shortage from the consideration of the Jury which was the only thing he could do under the circumstances. The cases cited by plaintiff amply support the decision of the Trial Judge that a jury should not be allowed to guess and speculate on an approximate inventory, based on approximate shrinks and gains, in which approximate shortages could admittedly be the result of (a) errors in transfer, (b) errors in taking the inventory, (c) additional shrink due to spoilage, (d) mistakes, (e) improper shrinkage factors, or (f) from theft, particularly where the plaintiff failed to produce the accurate inventory taken at the end of the fiscal year (7b)a and failed and refused to produce other records in support of the inventory (4b, 5b, 6b, 13b, 14b, 16b, 24b, 26b, 68b, 70b), and failed to offer evidence to eliminate the causes for which defendant would not be responsible.

It will not be presumed that an injury arose from a cause from which a liability arises, when the fact of the injury is equally consistent with the presumption that it arose from one of several other separate and distinct causes which do not give rise to a liability. *Village of Willoughby* v. *Malone*, 122 O. S., 315. Allen, J.; *Gedra* v. *Dallmar Co.*, 153 O. S., 258, 91 N.E. (2d) 256.

Where a plaintiff produces evidence that is consistent with an hypothesis that there was no inventory loss resulting from employee infidelity and also one that there might have been, his proof tends to establish neither. *Ewing* v. *Goode*, (6th Cir.) 78 Fed. 442, 444.

One swallow does not make a summer. Neither does one frustrated attempted theft of a few hams and shoulders on a single occasion, even though committed by an employee of the plaintiff, establish that a claimed inventory loss of $162,937.24 or $146,370.57 or $146,578.57, or any other sum, sustained over a period of three years, or two years, or twenty-one months was occasioned by the theft or dishonesty of plaintiff's employees. *Lipman Brothers* v. *Hartford Accident & Indemnity Co.*, 100 Atl. (2d) 246.

The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong. *Storey Parchment Co.* v. *Patterson Paper Co.*, 282 U. S., 555, Syl. 6; where the damages are not the certain result of the default but are uncertain, contingent, conjectural or speculative, they cannot be made the basis of a recovery. *H. W. Caster and Sons Advertising Co.* v. *Grove Laboratories*, 58 F. S. 1011, Syl. 15. The appellant's inventory pound shortage was at all times wholly speculative, wholly uncertain, wholly unreliable and never shown to be the certain result of the acts of Harris or any other employee.

Where the evidence creates no more than a mere suspicion or surmise that some of the inventory shortage might have been due to employees' dishonesty, plaintiff cannot recover. *New Amsterdam Casualty Co.* v. *W. D. Felder & Co., Inc.*, 214 F. (2d) 825, Syl. 3 (cited by plaintiff) where, because there was *no* evidence showing any probability that the loss was occasioned in any other manner, the Court allowed the inventory figures to go to the Jury.

In *Stanley Company* v. *National Surety Corporation*, 39 N.Y.S. (2d) 509, 512, the Court said:

> "In addition to the amounts which these employees allegedly admitted taking, the plaintiff has attempted to prove that the loss sustained and covered by the bond amounted to at least the sum sought to be recovered in this action. This proof consists, in part, of the books and records of the restaurant corporation which, it is claimed, show the amount of money which should have been turned in, based upon the amount of food which is alleged to have been sold during the period in question. The attempted analysis of the books of the restaurant falls short of the required amount of proof to sustain the burden placed upon the plaintiff to establish the amount of any loss covered by the bond written by the defendant."

Evidence which shows simply that an injury may have resulted in the course of employment or may have been suffered in the regular course of nature is not evidence to support a workmen's compensation claim *Gerich* v. *Republic Steel Co.*, 153 O. S., 463, 92 N.E. (2d) 393; *Burens* v. *Industrial Commission*, 162 O. S., 549, 124 N.E. (2d) 724.

In *Anderson* v. *Mt. Clements Pottery Co.*, 328 U. S., 680, 66 S.Ct., 1187 (relied upon by plaintiff), it was the *employer* who failed to keep accurate records which led to the statement quoted by opposing counsel. Actually, the Court said in the fifth syllabus:

> "An *employer* who has not kept the records required by Section 11 (c) cannot be heard to complain that damages assessed against him lack the precision of measurement that would be possible had he kept such records."

So, too, plaintiff whose records were uncertain, contingent, speculative and conjectural, cannot complain that the Trial Judge refused to allow the Jury to guess and speculate over figures that plaintiff's certified public accountant refused to certify based wholly on approximates.

If there are other causes equally proximate, plaintiff cannot recover unless he shows the one he complains about was the real cause, otherwise the Jury would just be guessing at which was the cause *Ebhardt* v. *Safeway Stores*, 227 F. (2d) 379, 380, Col. 2.

COUNTER STATEMENT OF QUESTION II.

May the Trial Judge withdraw alleged loss caused by unidentifiable employees where there is no evidence that any unidentifiable employee removed any hams, shoulders or bacon from plaintiff's meat plant and there is no substantial evidence that any unidentifiable employee actually removed pork loins from plaintiff's plant and plaintiff's counsel removes sausage from the consideration of the Jury?

The Trial Court said "Yes".

Appellee agrees.

Appellant's statement that sausage and loin cuts were "stolen" by unidentifiable employees is unsupported by the evidence — Appellant's counsel said:

(726)

"and I may say to you also, in consideration of the case, at this point, sausage may be eliminated as the testimony of Harris, with respect to sausage is too indefinite. So, the case is now restricted and confined to fresh pork and smoked pork."

The testimony of Harris, an alleged off and on employee, whose record showed he was employed July 26, 1950, does not disclose any sausage or loins were wrongfully taken from plaintiff's plant.

Harris was asked:

(20a)

"Q Now how prevalent was the taking of meat by other employees?

"A I should say some left there every day."

We ask — left where?

(21a)

"Q You stated you saw a number of other employees whose names you do not know take meat products and put it in their pockets, small quantities?

"A That's right."

We ask — what meat products?

"Q The people you saw take the stuff were other employees?

"A That's right."

We ask — what stuff?

(22a)

"Q Any other persons besides Robert Maiden, Helen Hurt, Willie Early, James Jackson, yourself that you can name?

"A They was all involved with me. Rest of them took it out in their pockets.

"Q Those are the only ones involved with you?

"A That's right.

"Q And the others took it out in their pockets?

"A That's right.

"Q You say you don't remember the names of any of them?

"A No, I don't know their names."

We ask — took what?

Counsel continues his little game of uncertainty — just an inference on an inference — no one accused any unidentifiable employees of taking hams, shoulders and bacon from plaintiff's premises and the Court was justified in removing the loss alleged to have been sustained by unidentifiable employees from the consideration of the Jury, at least plaintiff-

appellant made no objection to the action of the Trial Court and himself withdrew sausage so, all that was really left were hams, shoulders and bacon.

COUNTER STATEMENT OF QUESTION III.

Under the facts in Question I, is the Trial Court permitted to submit a special verdict permitting the Jury to find upon the remaining issues in the case by answering specific questions and to make additional findings on facts not included in the questions propounded in the special verdict?

The Court said "Yes".

Appellee agrees.

Again, appellant's question is not supported by fact.

The Trial Court was permitted under Civil Rules of Federal Procedure 47(a), 28 U.S.C.A. to submit a special verdict, and at no stage of the proceedings was there any request by plaintiff to add one word to the special verdict.

Appellant says testimony that Harris worked two years was unrebutted.

Appellant said to the Jury:

> (Tr. 1184)
> "This is his testimony. He began work as a regular employee, as a permanent employee on July 26, 1950. Prior to that time he worked off and on as a day laborer and there is no evidence to the contrary.

Appellant provided the employment record of Harris showing he was first employed July 26, 1950; no other record was offered when demand was made (20b, 33b). During the Trial appellant repudiated its record by saying Harris was a spot laborer for around two years. The Court ac-

cepted appellant's record of regular employment and also allowed the Jury to find other dates of employment of Harris (215a, 216a).

Appellant made no objection to the use of the word "date" by the Trial Court. The Court could have used time, period, or any other term selected by appellant, equally well but counsel did not feel the word "date" was inappropriate at that time and no other word was suggested. Counsel's interpretation is also repudiated by the finding that Harris committed dishonest acts during the time of his regular employment according to the testimony and on three other occasions so, the Jury understood what the Trial Court meant by "dates".

While counsel objected to the form of the special verdict he made no objection to its substance, he offered no suggested amendments, no suggested changes, no request for additional findings.

What was the duty of counsel to stand idly by or to assist the Court by suggestions and additional questions if those submitted were not satisfactory to counsel — he did not request that the Jury make additional findings. Appellant did not contend any issue of fact was omitted. He acted negatively — not affirmatively, and he omits to inform this Court that the Trial Court said.

(217a) (74b)

"You are not limited to what is submitted here. If you find that other facts are important that you wish to make a finding on, considering the issues in this case, you may make additional findings that are not indicated in this document."

Counsel has taken a line here, a phrase there, unconnected and out of context, and, on such disjointed excerpts, based his conclusions which he wishes to impress upon this Court. He wholly ignored the requirements of Rule 49a of the Federal Rules of Civil Procedure, 28 U.S.C.A.

Not one case is cited which supports counsel's position that the Trial Court erred in the giving of the special verdict, or that counsel can stand idly by and then predicate error where no suggestion or request for modification, addition or correction has been made.

COUNTER STATEMENT OF QUESTION IV

Where a witness, who refuses to testify, has given a signed confession or statement to another witness can counsel ignore the signed statement and attempt to offer an alleged excerpt from the signed statement by calling the person who took the statement as his witness?

The Trial Court said "No".

Appellee agrees.

Appellant fails to advise this Court that appellant had in its possession at the trial an original signed statement taken from James Jackson by Officer Merica. This signed statement was never offered as a declaration against the proprietary or pecuniary interest of James Jackson, it was never even produced even though appellee requested that it be produced and offered in evidence. Instead, appellant attempted to have Officer Merica testify to an alleged phrase from the signed confession. Again appellant takes words out of context.

The cases cited by counsel do not support the proposition that an alleged phrase can be substituted for a signed statement given to the third party witness.

A review of the cases discloses that in one an affidavit was offered, in another a signed confession was involved, in another a suicide note was offered, in another a letter was offered. In none does it appeal that a single alleged sentence or part of a signed statement can be offered and the

balance withheld by the appellant. If appellant wanted to introduce the signed statement, he was invited to do so (71b, 72b).

It might be well at this time to note that under Question XI appellant contends that the Trial Court erred in not instructing the Jury that appellant *had no right* to introduce the statement in evidence. Appellant's counsel so stated to the Jury (212a).

We do not believe that the signed confession would have been competent against the defendant appellee if appellee chose to object to the introduction of the signed confession. *Jackson Paper Co. v. Hartford Accident & Indemnity Company*, 69 Southern (2d) 411; *Stanley Company, Inc. v. National Surety Corp.*, 39 N.Y.S. (2d) 509.

However, appellee asked that the signed confession or statement given by James Jackson be produced and offered in evidence, but appellant refused.

Appellant has thrown alleged questions at this Court which are as numerous as the falling leaves. We comment on the alleged questions presented in general by simply stating that appellant's questions 6, 8, 9, 11 and 12 are not supported by any authority and question 10 is not supported by either argument or authority. These questions are simply inquiries to this Honorable Court. In Question 11 appellant contends that the Court erred in not charging the Jury that appellant had no right to introduce the signed statements of the witnesses. In Question 4 appellant contended the Court erred in not allowing appellant to introduce an excerpt from one of the statements.

In Appellant's Question 7 we continue to observe the customary disregard that appellant has for the evidence in stating his question. Appellant contends the Trial Court only referred to part of the statement of William

Harris in an unfavorable, unjustified manner. Let's see what the Court actually did. Let's look at the facts.

The Trial Judge read all of the testimony of William Harris (213a). Appellant made no request that the reporter read any additional testimony to the Jury.

Appellant argued to the Jury:

(73b) "Now, as far as Jackson is concerned, we had him on the stand. I leave it to you whether we should have brought in Maiden, Hurt and Early. Are these people who have been convicted going to take the stand and admit the commission of crime? What chance would we have? Isn't that ridiculous? If they felt they would deny it, they had the same opportunity, they could have called them."

The Court charged:

(216a) "While James Jackson and William Harris were prosecuted, the evidence is silent about Helen Hurt, Willie Early and Robert Maiden, except what William Harris says about them."

Appellant had just told the Jury that Maiden, Hurt and Early had been convicted, but appellant objects to the Trial Court correcting the record.

Appellant next objects to the use of the word "involved" but he did not object at the time, nor was any request made to modify this alleged improper part of the charge. *Jack* v. *Craighead Rice Mill Co.*, 167 F. (2d) 96; *Trobridge* v. *Abrasive Co.*, 190 F. (2d) 825; *Rule 51, 28 U.S.C.A. Rules of Federal Procedure.*

Appellant is critical of the charge of the Court on burden of proof and quotes a part of the charge, then charges that these five lines were unfair to appellant. Let's look at the facts.

Appellant quotes the following five lines at page 70-71 of his brief:

(216a) "The burden is on the plaintiff to prove the time of employment by a preponderance of the evidence. In this connection you have a right to consider the testimony that the plaintiff destroyed employment records in 1953 while this suit was pending."

There was no objection to this portion of the charge, as required by the *Federal Rules of Civil Procedure, Rule 51, 28 U.S.C.A.*

Actually, the Court said:

(215a) "There is evidence that Helen Hurt, Robert Maiden and James Jackson were employed by the plaintiff before 1948. Plaintiff has employment records to this effect. Plaintiff has an employment card to the effect that Willie Early was employed July 3, 1950. William Harris according to the record evidence, was employed regularly July 26, 1950, and there (216a) is a card showing that he worked three days beginning April 26, 1950. Mr. Harris you will recall said he worked off and on before his regular employment. Mr. McConkey said he was there. That is, Harris was there when he came to plaintiff's place in September, 1949.

The burden is on the plaintiff to prove the time of employment by a preponderance of the evidence. In this connection, you have a right to consider the testimony that the plaintiff destroyed employment records in 1953 while this suit was pending.

If the plaintiff failed to prove a preponderance of the evidence, the employment of William Harris, other than what is shown by the records, then this case must fail to that extent. * * * Obviously, if he wasn't working he couldn't steal anything and would not know what anyone else did."

Again, appellant has taken a few lines out of context as a basis to charge unfairness on the part of the Trial Court. Appellant, on the basis of these few lines, charges that the Trial Court unfairly emphasized parts of the testi-

mony but the cases cited do not support appellant's contention that the Trial Judge was biased and unfair, a charge wholly unjustified. The cases cited are so different on their facts that they are not relevant authorities in the situation presented by this record.

Counsel quotes at length, but never reaches the language of the trial Judge in the cases cited.

It has repeatedly been held that it is not reversible error for a Federal Judge to comment upon, and express his opinion upon, testimony so long as the weight and effect of the testimony is left to the Jury.

Counsel charges that the Trial Judge commented unfairly on the evidence, but fails to advise this Court that the lower Court charged the Jury:

> (222a) "You should not be swayed or influenced by any feeling of sympathy or prejudice. It is your duty to carefully reflect upon all of the evidence before you and make your finding in accordance.
> "Let your only effort be to arrive at a just and fair verdict between the parties.
> "If you consider anything that the Court says in this charge as an expression of opinion on any disputed question of facts, you may disregard it, because you are the sole judges of the facts, the weight of the evidence and the credibility of the witnesses. It is peculiarly in the province of the jury to judge of the credibility of the witnesses. That is to say, the extent to which they should be believed and the importance and weight to be given to their testimony. You may believe all of any witness' testimony, or you may disbelieve all of it; or you may believe it in part and disbelieve it in part."

There is just nothing to counsel's attempt to besmirch the Trial Court who, this record will show, was most considerate of appellant's counsel's tactics during the course of trial.

CONCLUSION

We submit that the Trial Court was justified in withdrawing the inventory shortage from the Jury; that when counsel by agreement withdraw exhibits without submitting those withdrawn to the Trial Court, the Trial Court is blameless; that the special verdict was correct and as no additions or modifications were requested to be submitted, counsel's complaint is without foundation; that there was no misconduct on the part of the Trial Court in its charge to the Jury and the rulings of the Trial Court and the verdict of the Jury are in all respects correct and the judgment of the Trial Court should be affirmed.

Respectfully submitted,

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